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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation ash generated by the burning of municipal solid waste at such a facility.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago and Mayor Richard M. Daley, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-17a, is reported at 948 F.2d 345 (7th Cir. 1991). The district court's memorandum opinion and order of November 29, 1989, App., *infra*, at 18a-29a, is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 6921(i)

Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources),

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

STATEMENT

1. *Background.* The country is now in the midst of a waste disposal crisis. We generated approximately 180 million tons of municipal solid waste—the "residential and commercial solid wastes generated within a community" (40 C.F.R. § 241.101(k)) in 1988; that number is projected to grow to 216 million tons by the year 2000. See 56 Fed. Reg. 50978, 50980 (1991) (summarizing the findings of Environmental Protection Agency study).

Much of that waste is now deposited in landfills, but we are quickly running out of landfill capacity. In a 1986 study, 45% of municipal landfill owner/operators reported that their landfills would reach capacity by 1991. *Ibid.*

More than fifteen years ago, Congress warned that "alternatives to existing methods of land disposal must be developed since many of the cities of the United States" are running out of waste disposal sites. 42 U.S.C. § 6901(b)(6). More recently, Congress has determined that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste." *Id.* § 6941(a)(3). See also *id.* § 6941(a)(2) ("solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials").

Facilities that extract reusable materials from municipal solid waste or convert solid waste into energy are classified as "resource recovery" facilities under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903(24). As of November 1991, there were 137 resource recovery facilities in operation in the United States, (Kiser, *Municipal Waste Combustion in the United States: An Overview*, Waste Age, Nov. 1991, at 27), eleven facilities under construction, and an estimated additional 57 facilities in the planning phase. *Id.* at 109. These facilities generate power that is equivalent to the amount of energy needed to supply electricity to 1.2 million homes, or the amount produced by 30 million barrels of oil. *Id.* at 27.

The general federal statutes and regulations governing waste disposal are an important part of the regulatory matrix applicable to the operation of resource recovery

facilities. When Congress enacted RCRA, it directed that "hazardous waste" be managed pursuant to a separate regulatory scheme—set forth in Subtitle C of the statute—that establishes standards for the treatment, storage, and disposal of such waste. See 42 U.S.C. §§ 6921-6939.[1] Generators of hazardous waste must obtain an identification number from the United States Environmental Protection Agency (EPA) before engaging in the treatment, storage, transportation, or disposal of hazardous wastes. See 40 C.F.R. § 262.12 (1991). Hazardous waste must be packaged, labelled, and marked according to specific regulations before it may be shipped. See *id.* § 262.30-33. It may be held only in approved containers for specified periods of time. See *id.* § 262.34. Facilities that treat, store, or dispose of hazardous waste must obtain permits (see 42 U.S.C. § 6925), and must comply with many regulations setting performance standards for such facilities. See *id.* § 6924; 40 C.F.R. § 264.1-264.1065.

Disposal of non-hazardous waste is regulated under Subtitle D of RCRA, which provides significantly less stringent regulation than Subtitle C. See 42 U.S.C. §§ 6941-6949. The EPA has recently promulgated regulations setting minimum national standards for these landfills. See 56 Fed. Reg. 50978 (1991).

Waste from homes and offices frequently contains some components that qualify as hazardous waste under the federal scheme, but Congress made clear in the legisla-

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[1] The statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5).

tive history of RCRA that it did not intend to regulate such "general municipal wastes" as hazardous waste. S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). The EPA subsequently promulgated a regulation—the "household waste exclusion"—providing that "any material * * * derived from households (including single and multiple residences, hotels and motels * * *)" is not hazardous waste within the meaning of the statute. 40 C.F.R. § 261.4(b)(1). This exclusion permits the disposal of all household waste in a Subtitle D landfill, even if the waste would qualify as hazardous waste under the generally applicable statutory standard.

At the time the EPA issued this regulation, it stated that the exclusion extended to ash remaining after household waste was burned in an incinerator. "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33098 (1980).

In 1984, Congress added a new provision to RCRA—Section 3001(i)—entitled "Clarification of household waste exclusion." It states in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purposes of regulation under this subchapter" if the facility receives and burns only (a) household waste, and (b) commercial and industrial solid waste that does not contain hazardous waste. 42 U.S.C. § 6921(i).[2]

The Senate committee report accompanying this provision observed that resource recovery facilities often take

[2] In addition, the facility may not accept hazardous waste, and the owner or operator of the facility must have "established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. § 6921(i)(2).

in household waste mixed with non-hazardous waste from sources other than households, such as schools, churches, and municipal buildings. The committee stated that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983).

The question in this case is whether, pursuant to Section 3001(i), the ash residue remaining after solid waste is burned in a resource recovery facility may be disposed of in a Subtitle D disposal facility, regardless of whether the ash might qualify as a hazardous waste under the generally applicable standard.

2. *The Chicago Resource Recovery Facility.* The City of Chicago owns and operates a resource recovery facility, the Northwest Waste-to-Energy Facility ("Northwest Facility"), where it burns municipal solid waste and generates electricity, thereby reducing the volume of waste disposed of in landfills and helping to reduce dependence on imported oil for the generation of electricity. The facility processes approximately 14% of the municipal solid waste produced in Chicago. R. 18. It also produces steam by recovering the energy generated from the combustion of the waste. The steam is used not only for its own operations, but is also sold for $1 million to nearby industry and for another $500,000 to the local utility. *Ibid.* Finally, the facility recovers approximately 55 tons of tin cans and other ferrous metals each day, which are sold to scrap metal dealers. *Ibid.*

The ash remaining after the waste is burned is disposed of at sanitary landfill located in Three Oaks, Michigan, that receives only municipal incinerator ash. R. 18.

This is a lined landfill with a leachate collection system and groundwater monitoring systems to monitor its performance. *Ibid.* The City does not test the ash produced at the Northwest Facility to determine whether it is hazardous and has not managed the ash as a hazardous waste.

3. *The Proceedings Below.* The Environmental Defense Fund and Citizens for a Better Environment (hereinafter collectively referred to as EDF) filed the complaint in this case, alleging that the City violated several provisions of RCRA, 42 U.S.C. §§ 6901-6992(k), by not handling the ash produced at the Northwest Facility as a hazardous waste pursuant to Subtitle C of RCRA. R. 1. The district court had jurisdiction over this federal question pursuant to 28 U.S.C. § 1331. EDF simultaneously filed a similar action in the Southern District of New York against Wheelabrator Technologies, Inc. and Westchester Resco Co., which own and operate a resource recovery facility in Peekskill, New York. See *Environmental Defense Fund v. Wheelabrator Techonologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 493 (1991).

In this case, the parties filed cross motions for summary judgment. R. 18, 30. The City's position was that Section 3001(i) exempted the process of incinerating waste and producing ash at a resource recovery facility from regulation as hazardous waste. In addition to filing its own motion for summary judgment, EDF opposed the City's motion on the grounds that the City had not yet demonstrated that the City's facility met the requirements of Section 3001(i).

The district court issued a memorandum opinion and order holding that Section 3001(i) of RCRA exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. App., *infra*, at 18a. The court held that when Congress amended RCRA to exempt resource recovery facilities from hazardous waste regula-

tion, it intended to exclude all waste management activities at these facilities from regulation. *Id.* at 24a. The district court found that this conclusion was consistent with RCRA's policy goal of encouraging resource recovery facilities and removing impediments that may hinder their development and operation. *Ibid.* The district court, however, denied both motions for summary judgment, allowing EDF additional discovery to determine whether the Chicago facility met the requirement of Section 3001(i) that it have adequate procedures for excluding the intake of hazardous wastes. *Id.* at 29a.

EDF later stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and would not oppose a renewed motion for summary judgment by the City. R. 91. The district court subsequently granted the City's renewed motion for summary judgment. App., *infra*, at 30a.

A divided court of appeals reversed. The majority held that the ash generated by a municipal solid waste incinerator must be disposed of in accordance with the provisions of Subtitle C of RCRA. App., *infra*, at 14a, 16a. The majority focused on the Section 3001(i) exception from hazardous waste regulations when a resource recovery facility is "treating, storing, disposing of, or otherwise managing" waste, noting that that section does not explicitly exempt the ash "generated" by such facilities. App., *infra*, at 15a-16a. The majority acknowledged that the only other appellate court to address this issue, the Second Circuit in the *Wheelabrator* case, had reached the opposite conclusion. *Id.* at 4a. In that case, the Second Circuit concluded that Section 3001(i) of RCRA exempted the ash remaining after incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. See *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d at 213.

Judge Ripple dissented, stating that he would affirm for the reasons stated in the Second Circuit and Southern District of New York opinions.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision in this case squarely conflicts with the decision of the Second Circuit on an important issue of federal environmental law affecting resource recovery facilities throughout the country that burn municipal solid waste to produce energy. Now, resource recovery facilities located in the Second Circuit may manage the ash remaining when they burn municipal solid waste as a non-hazardous waste pursuant to Subtitle D of RCRA, but, as a result of the decision below, all resource recovery facilities in the Seventh Circuit must manage the ash as a hazardous waste pursuant to Subtitle C. These conflicting decisions destroy the uniformity necessary to the effectiveness of environmental policy.

The conflict between the circuits also produces substantial hardship and unfairness. Subtitle C disposal is considerably more onerous, and therefore, much more expensive, than disposal under Subtitle D.[3] That additional cost has been imposed on resource recovery facilities within the Seventh Circuit, but not on facilities in the Second Circuit.

Moreover, resource recovery facilities in other circuits now face great uncertainty in determining how to man-

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[3] For example, charges for disposing of a ton of waste at a Subtitle D landfill in the Midwest average $23.15 per ton. National Solid Waste Management Ass'n, *1990 Landfill Tipping Fee Survey*, at 7. A conservative 1990 average cost for required stabilization and disposal of waste at a Subtitle C landfill is $210 per ton; nearly ten times as much. See ICF, Inc., *1990 Survey of Selected Firms in the Commercial Hazardous Waste Management Industry, Draft Report* (Sept. 17, 1991) (Prepared for U.S. Environmental Protection Agency, Office of Policy Analysis). For the City's Northwest Facility, which must dispose of between 110,000 and 140,000 tons of ash annually (App., *infra*, at 2a), the increased cost for disposal alone could amount to more than $20 million dollars each year. In addition, the City almost certainly would have to shoulder increased costs for transportation of the ash because transporters would have to comply with Subtitle C requirements.

age their ash. Their choice is to treat the ash as a hazardous waste or ship it to a circuit where it has not been held to be a hazardous waste, either way incurring large and perhaps wholly unnecessary expenses that would substantially alter the economics of running such a facility. Or they may treat the ash as a non-hazardous waste and risk the heavy penalties that may be imposed in the event that other courts subsequently hold that the ash is a hazardous waste that should have been managed in accordance with Subtitle C. Transporters of ash and operators of waste disposal facilities that receive ash face similar uncertainty: they are all subject to huge monetary penalties if they fail to comply with Subtitle C requirements and those provisions are later held applicable to ash. This state of affairs creates the anomalous possibility that municipal waste in one circuit might now be transported to another circuit for incineration. The petition for a writ of certiorari should be granted in this case to resolve this conflict, eliminate the current uncertainty, and alleviate the unwarranted burden on resource recovery facilities in the Seventh Circuit.

1. The Second and Seventh Circuits have reached diametrically opposed interpretations of Section 3001(i) of RCRA. Section 3001(i) provides, in pertinent part, that:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] * * *.

42 U.S.C. § 6921(i). The Seventh Circuit's majority held that because this section did not specifically provide an exemption for generating hazardous waste, the ash produced by resource recovery facilities burning municipal solid waste must be managed as hazardous waste, notwithstanding the specific exemptions for "treating, storing, disposing of, or otherwise managing hazardous

wastes." The Second Circuit, by contrast, interpreting Section 3001(i) in the *Wheelabrator* case, held that this section did exempt from hazardous waste regulation the ash generated by the burning of municipal solid waste, notwithstanding the absence of a specific exemption in the statute for "generating" hazardous waste. *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 765, 770 (S.D.N.Y. 1989), aff'd and adopted, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 493 (1991).[4]

As a result of the conflict in the circuits, resource recovery facilities are uncertain how to plan and carry out their operations. Local governments that operate or contract with resource recovery facilities as well as disposal site operators, are subject to substantial penalties under RCRA—up to $25,000 per day—for mishandling hazardous waste. See 42 U.S.C. § 6928(g). And, as this case demonstrates, actions seeking penalties may be brought by private parties, not just by the EPA. 42 U.S.C. § 6972(a). Accordingly, the 97 resource recovery facilities outside of the Second and Seventh Circuits and the numerous waste disposal facilities in those 44 states must now choose among incurring the very significant costs of treating the ash as a hazardous waste, (see note 3, *supra*), facing harsh RCRA penalties if they guess wrongly about how the ash should be treated in their circuit, or shipping waste to the Second Circuit for incineration. Such a situation is intoleratble. Efficient operations under a statute as complex and specific as RCRA are severely compromised by this uncertainty.

The practical problems this lack of uniformity can cause are well illustrated in this case. The City's Northwest Facility is located in the City of Chicago, in the Seventh Circuit. The ash produced at that facility was

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[4] When this Court denied the petition in the *Wheelabrator* case, there was no conflict between the circuits because the Seventh Circuit had not yet issued its opinion in the present case.

disposed of at a landfill located in Michigan, in the Sixth Circuit. Although the ash is regulated as a hazardous waste within the Seventh Circuit, the Sixth Circuit Court of Appeals has not addressed the issue. But the landfill that used to accept the ash from the Northwest Facility is as effectively regulated as if there were law in that circuit. The City of Chicago cannot, under the Seventh Circuit's ruling, continue to do business with the landfill in Michigan, unless it moves its incinerator to the Sixth Circuit, or contracts with an incinerator operator there. The situation facing local governments in the First and Third Circuits is even more precarious. Under the *Wheelabrator* case, a resource recovery facility in the Second Circuit can continue to dispose of ash under Subtitle D of RCRA. But a disposal site in an adjacent circuit, where the court of appeals has not spoken, might well refuse to accept municipal ash because of the fear of RCRA penalties, should the First or Third Circuits ultimately side with the Seventh in requiring such ash to be managed as hazardous waste under Subtitle C. Yet, waste from the First and Third Circuits could still be shipped to the Second for incineration, although it is far from clear which circuit's law would apply in an action seeking to impose fines on a local government sending its waste to another circuit.

Federal regulation of the ash, whether under Subtitle D or Subtitle C of RCRA, should be uniform throughout the country. This Court should resolve this conflict so that federal regulation of the ash does not depend upon the location of the resource recovery facility and so that resource recovery facilities and disposal sites can plan and carry out their operations with certainty.

2. The decision of the Seventh Circuit majority is also wrong. It is at odds with the plain language of the statute, its purpose, and intent. The language of Section 3001(i) is broad. It exempts the activities of a resource recovery facility from all hazardous waste regulation—

those governing "treating, storing, disposing of, or otherwise managing" waste. The statutory definition of hazardous waste "management" includes all "storage, transportation, processing, treatment, recovery and disposal of hazardous wastes." 42 U.S.C. § 6903(7). "Treatment" is defined, in part, as "any method, technique, or process * * * designed * * * so as to render such waste * * * reduced in volume." 42 U.S.C. § 6903(34). These terms plainly encompass producing and then handling and disposing of ash. Thus, by holding that Subtitle C regulations apply to the production and handling of ash, the Seventh Circuit has violated the plain terms of Section 3001(i), which indicates that facilities like the Northwest Facility need not comply with the requirements of Subtitle C because they do not treat or "manag[e] hazardous wastes."

The legislative history of Section 3001(i) also indicates its scope. It clarifies that the ash produced at a resource recovery facility is exempt from regulation. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation and commented on Section 3001(i), clearly stated that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion * * *." S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). In addition, Section 3001(i) is a clarification of the EPA's Household Waste Exclusion, "a previously existing regulatory exclusion which clearly extended to ash." *Wheelabrator*, 725 F. Supp. at 765.

Because the EPA's Household Waste Exclusion extends to the ash produced when household waste is burned, the result of the Seventh Circuit's construction of the statute is that ash produced by incinerators burning only household waste is exempt from Subtitle C regulation, but ash produced by resource recovery facilities burning household waste and non-hazardous commercial waste is not. *See Wheelabrator*, 725 F. Supp. at 765. Thus, the court

below has transformed a statute designed to provide an incentive for resource recovery by relieving regulatory burdens on resource recovery facilities that burn non-hazardous commercial waste as well as household waste into one that subjects those facilities to greater regulation and increased costs. That is precisely the opposite of what Congress sought to achieve.

Indeed, if Section 3001(i) subjects the ash remaining from the burning of municipal waste to Subtitle C regulation, Section 3001(i) provides little if any regulatory relief for resource recovery facilities because it fails to exempt these facilities from one of the most onerous regulatory burdens. See *Wheelabrator*, 725 F. Supp. at 763 n.12 (if ash is not exempt from regulation as a hazardous waste "it is difficult to understand what, if any, benefit [resource recovery facilities] derive[] from the exemption"). This misinterpretation of Section 3001(i) should be corrected by this court.

3. Important policy considerations favor the resolution of the question presented in this case. Disposal of garbage is one of the major problems local governments are facing today. Congress has recognized that the United States is confronted with a solid waste disposal crisis, due to an ever increasing volume of solid waste and a rapidly diminishing amount of landfill space (see 42 U.S.C. § 6901(a) and (b)), and that reliance on landfills as the primary method for solid waste disposal needlessly pollutes valuable land and results in the burial of millions of tons of recoverable materials and energy sources (see *id.* § 6901(b)(1), (c) and (d)). Congress has found that the recovery of solid waste materials "can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments" (*ibid.*), and that solid wastes represent a potential source of energy that can reduce the nation's dependence upon sources of energy such as petroleum products, natural gas, nuclear and hydroelectric generation of energy (*id.* § 6901(d)). When Congress amended Subtitle D of RCRA in 1980, it found that:

> (2) solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;
>
> (3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste.

Id. § 6941(a)(2) and (3). Resource recovery facilities further these congressional goals.

The conclusion of the majority below that Congress would not have approved the disposal of hazardous ash in ordinary landfills, App., *infra*, at 16a, ignored these important reasons Congress had for encouraging the development and use of resource recovery facilities. Congress has made it clear that it intends to encourage resource recovery facilities. See 42 U.S.C. §§ 6902(1), (10) and (11), 6948(d)(3). Indeed, the Senate Report accompanying Section 3001(i) states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284, at 61. The congressional choice reflected in Section 3001(i) to exclude the waste management activities of resource recovery facilities from hazardous waste management regulations was intended to encourage resource recovery as one of the solutions to this country's mounting solid waste disposal crisis.

The present confusion regarding the scope of the Section 3001(i) exemption will have a significant deterrent effect on development of additional resource recovery facilities. The cost of disposing of ash is an important element of the economics of operating these facilities. See note 3, *supra*. The municipalities considering such a project cannot now determine whether resource recovery will be justified economically because they cannot make

any reliable projection of disposal costs. A municipality would be unlikely to embark on such an expensive undertaking when it has no way to predict the eventual costs and, therefore, whether the anticipated revenues would cover those costs. Thus, the uncertainty spawned by the conflicting appellate decisions is at the present time thwarting Congress's clear purpose of encouraging use of this technology.

4. Finally, both the Second Circuit and the Seventh Circuit concluded that Congress has left the question of the meaning of Section 3001(i) for judicial resolution. *See Wheelabrator*, 931 F.2d at 213; App., *infra*, at 5a. This conclusion was based upon Section 306 of the Clean Air Act Amendments of 1990, which provides that:

> For a period of 2 years after the date of the enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act. Such reference and limitation shall not be construed to affect any activity by the administrator following the 2-year period from the date of enactment of the Clean Air Act Amendments of 1990.

Clean Air Act Amendments, Pub. L. No. 101-549, § 306, 104 Stat. 2399, 2584 (1990). The Conference Report accompanying this section specifically stated that "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.*, 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.), or any state activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342, reprinted in 1990 U.S. Code Cong. & Admin. News 3867, 3874. Both courts of appeals interpreted this section of the Clean Air Act Amendments to mean that Congress intended to preclude the EPA from

promulgating any new regulations, but to allow the EPA to enforce the regulatory scheme already in place. See *Wheelabrator*, 931 F. 2d at 213; App., *infra*, at 5a. Both courts concluded that Congress was waiting for the courts to resolve the issue raised in these cases.[5] The two courts, however, reached opposite conclusions about the meaning of Section 3001(i). Because the courts of appeals are in disagreement, it is up to this Court to provide Congress with a judicial resolution of that question.[6]

Moreover, the EPA, the agency charged with enforcement of RCRA, has been unable to resolve this issue. EPA regulations simply restate the language of Section 3001(i). See 40 C.F.R. § 261.4(b). A preamble to the regulations stated that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28726 (1985).

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[5] The Seventh Circuit stated that "it may well have been that Congress wanted to see what the courts had to say before undertaking any retooling of the current regulatory scheme." App., *infra*, at 5a. Similarly, the Second Circuit stated that "Congress simply may have desired to maintain the status quo pending judicial resolution of the issues presented here and in *City of Chicago*. Once the courts have spoken, Congress will be in a better position to evaluate its options regarding the treatment of incinerator ash and to direct its future legislative efforts accordingly." *Wheelabrator*, 931 F.2d at 213.

[6] Although Congress is currently debating the reauthorization of RCRA, it is by no means certain that the issue raised in this case will be resolved by Congress. A new statute may not be enacted, or it may not deal with this issue. Moreover, a new statute might be prospective only, leaving all municipalities with resource recovery facilities outside of the Second Circuit with potential liability for substantal penalties in civil penalty actions, like this one, that can be commenced by private parties (see 42 U.S.C. § 6972(a)), if the issue of how the ash is to be regulated is not resolved by this Court. Resource recovery facilities should not be left in a state of uncertainty because of the mere possibility that Congress might act to address this issue some time in the future.

It went on to state, however, that future regulation of the ash "would have to await consideration of important technical and policy issues that would be posed in the event serious questions arise about the residue." *Ibid.* More important, since the EPA issued its regulations, several EPA officials have stated conflicting views on how the ash is to be regulated. See App., *infra*, at 10a-12a. Nor has the EPA ever attempted to enforce a requirement that the City manage the ash from the Northwest Facility as a hazardous waste. See R. 18. As a result of this inconsistency, the Seventh Circuit concluded that "[t]he see-sawing statements of the EPA to which the district court gave 'little weight' deserve no weight at all." App., *infra*, at 12a.

In sum, there is a conflict between the circuits on an important issue of environmental law: the management of ash produced at resource recovery facilities. A federal statute that depends for its effectiveness on uniform application throughout the country has been interpreted to exempt the ash from hazardous waste regulation in the Second Circuit, but to require the management of the ash as a hazardous waste in the Seventh Circuit, with the result that resource recovery facilities in all other circuits are uncertain how to manage their ash. Moreover, Congress has indicated that it is waiting for judicial resolution of this issue, and indeed there is no resolution likely from any other quarter. The courts of appeals and the EPA have been unable to resolve this issue. This Court should, therefore, resolve the question whether Section 3001(i) of RCRA exempts the ash produced at resource recovery facility from hazardous waste regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 18, 1992

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3060

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois.
No. 88 C 769—James B. Moran, *Chief Judge.*

ARGUED MAY 10, 1991—DECIDED NOVEMBER 19, 1991

Before BAUER, *Chief Judge*, POSNER, and RIPPLE, *Circuit Judges.**

BAUER, *Chief Judge.* In this case, we are asked to determine whether the ash generated by a municipal solid waste incinerator is "hazardous waste" that must be disposed of in accordance with the provisions of Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6992k ("RCRA"). The incinerator in question—the Northwest Waste-to-Energy Facility—has

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* This opinion was circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(f) because of an apparent conflict with *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F.Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991). No judge favored rehearing *en banc*; Judge Richard D. Cudahy did not participate.

been owned and operated by the City of Chicago ("the City") since 1971. Faced with rapidly diminishing space for landfill, the City has turned to innovative methods to dispose of the approximately 2.5 million tons of solid waste generated each year. The Northwest Facility was one of the first modern waste-to-energy resource recovery facilities in the United States and the only one in the State of Illinois. Each day, it receives for processing 200 to 250 truckloads of refuse, the bulk coming from residential units. The plant incinerates 350,000 tons of waste annually. The steam generated from the combustion of waste is used to run the facility.

The plaintiffs, the Environmental Defense Fund, Inc., and Citizens for a Better Environment (collectively, "EDF"), filed a complaint against the City and its mayor alleging that the City violated provisions of RCRA and its regulations governing the handling of hazardous waste. EDF maintains that the City is violating RCRA by unlawfully storing, transporting, disposing of, and otherwise handling the by-product of the incineration at the Northwest Facility, the 110,000 to 140,000 tons of ash produced every year. According to the EDF, the toxicity level of the ash is high enough to qualify it as a hazardous waste subject to special treatment under Subtitle C of RCRA. Between 1981 and 1987, thirty-five samples of ash from the Northwest Facility were tested. Out of these, thirty-two exhibited enough lead, cadmium, or both, to meet the standard for Extraction Procedure toxicity, which forms a part of Subtitle C.

Subtitle C establishes a regulatory scheme governing the treatment, storage, and disposal of hazardous wastes. (Non-hazardous waste is governed by Subtitle D of RCRA.) Generators of hazardous waste must apply for and receive a United States EPA identification number before engaging in the treatment, storage, disposal, transportation, or offering for transportation of hazardous waste. *See* 40 C.F.R. § 262.12. Before shipping,

hazardous waste must be packaged, labelled, and marked according to specific regulations. *See* 40 C.F.R. § 262.30-33. Hazardous waste must be accumulated in approved containers and only for specified periods of time. 40 C.F.R. § 262.34. Generators of hazardous waste also must maintain certain records, and file biennial reports with the EPA Regional Administrator. *See* 40 C.F.R. § 261.40-43. The ash produced by the Northwest Facility is not dealt with pursuant to this "cradle to grave" regulatory scheme. Instead, it is shipped off to Michigan for burial in a landfill cite that is not licensed to accept hazardous wastes.

In the district court, the parties filed cross motions for summary judgment. The City argued that the ash produced at the Northwest Facility is exempt from regulation under section 3001(i) of RCRA, 42 U.S.C. § 6921(i), which provides that a resource recovery facility will not be deemed to be "treating storing, disposing of, or otherwise managing" hazardous wastes for the purposes of regulation if the facility meets certain requirements. In addition to filing its own motion for summary judgment, EDF also opposed the City's motion on the ground that the City had not demonstrated that the Northwest Facility met the requirements of section 3001(i).

On November 29, 1989, the district court issued a memorandum and order, holding that section 3001(i) exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. *See Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419, 424 (N.D. Ill. 1989). The district court, however, denied both motions for summary judgment, allowing EDF additional discovery to determine whether the Chicago facility met the requirements of section 3001(i). In July 1990, EDF stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and that it would not oppose a renewed

motion for summary judgment by the City. On August 20, 1990, the district court granted the City's renewed motion for summary judgment. This appeal followed.

This case turns on the construction of section 3001(i). To make sense of this statute, we must sort through conflicting, often confusing, pronouncements from Congress and the EPA. Indeed, the EPA's various interpretations of the statute have muddied the waters to such an extent that courts have failed to give it the deference normally accorded to an agency's construction of a statute it administers. *See, e.g., Environmental Defense Fund v. City of Chicago*, 727 F. Supp. at 424; *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 766 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2nd Cir. 1991). The Second Circuit, the only appeals court to interpret section 3001(i) thus far, concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. *Wheelabrator*, 931 F.2d at 213.

As a threshold issue, we must consider whether, as the City suggests, this case has been rendered moot by passage of the 1990 amendments to the Clean Air Act. Section 306 of the amendments provides in part that "[f]or a period of 2 years after the date of enactment . . . ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to Section 3001 of the Solid Waste Disposal Act." Pub. L. No. 101-549, 104 Stat. 2399 (1990). When Congress enacted this provision, it was well aware that this matter was pending on appeal. The accompanying committee report explains, "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.*, 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.) [sic], or any

State activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342, *reprinted in* 1990 U.S.C.C.A.N. 3867, 3874.

What all this means is that the amendments to the Clean Air Act do not render this matter moot, but rather maintain the status quo until the time Congress reauthorizes RCRA. After that period expires, Congress may determine whether it wishes to revise the statute with regard to the ash question. Although we cannot say for certain, it well may have been that Congress wanted to see what the courts had to say on the issue before undertaking any retooling of the current regulatory scheme. Until then, the EPA is precluded from promulgating regulations on ash pursuant to section 3001(i). Nothing in the amendments, however, suggests that the EPA may not enforce the scheme now in place. What that covers, exactly, is for us to determine.

Having concluded that the matter properly is before us, we turn our attention to the district court's decision. As with all summary judgment determinations, we review the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law. *See, e.g., Santella v. City of Chicago*, 936 F.2d 328, 331 (7th Cir. 1991); *Dieckhoff v. Severson*, 915 F.2d 1145, 1148 (7th Cir. 1990). Before we can proceed, we must trace our way through a somewhat complicated statutory and regulatory scheme.

In 1980, EPA issued the "household waste exclusion," a regulation that explicitly exempted household waste from the statutory definition of "hazardous waste." *See* 45 Fed. Reg. 33,120 (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)). The exclusion had the effect of releasing households and municipalities from the burden of complying with the cumbersome requirements of Subtitle C. In the preamble to the regulation, the EPA stated that, "[s]ince household waste is excluded in all phases of its management, residues remaining after treatment

(*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.*

Congress never ratified this statement in the form of legislation. Instead, it enacted section 3001(i) in 1984 as part of the Hazardous and Solid Waste Amendments to RCRA to "clarify" the EPA's household waste exclusion. (Actually, Congress was interested in excluding from the extremely complex regulations that apply to facilities that specifically target hazardous waste municipal incinerators that inadvertently process hazardous materials that slip in with all the other junk.) Section 3001(i) provided the following:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subsection if—
>
> (1) such facility—
>
> (A) receives and burns only—
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section. . . .

42 U.S.C. § 6921(i).

Unlike the EPA preamble, section 3001(i) does not explicitly exempt the ash generated from resource recovery facilities from regulation as a hazardous waste. Nonetheless, each party to this litigation argues that the plain words of section 3001(i) support its position. The EDF contends that the section 3001(i) exemption covers only

very specific activities of municipal incinerators that handle household and commercial waste, including "treating, storing, disposing of, or otherwise managing hazardous wastes," but not the generating of hazardous wastes. In contrast, the City maintains that "managing" hazardous wastes covers everything that a resource recovery facility does, including the disposal of the ash residue resulting from incineration of municipal solid wastes.

The EPA's interpretation and the legislative history of the statute do little to resolve this stand-off. Following adoption of section 3001(i), the EPA incorporated its provisions into EPA regulations. *See* 40 C.F.R. § 261.4 (b)(1). In a preamble to the new regulations, the EPA explained:

> The statute [section 3001(i)] is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith effort to avoid such a result, from becoming subject to the Subtitle C regulations.

50 Fed. Reg. 28,725-26 (July 15, 1985).

Although not an all-out endorsement, this statement certainly runs in favor of subjecting the ash by-product of incineration to Subtitle C regulation. But was, as the EPA suggests, the legislative history silent on the ash question? Both the *Wheelabrator* district court, as affirmed by the Second Circuit, and the district court here held that the legislative history of RCRA demonstrates that Congress intended to exempt resource recovery facilities—and the ash they produce—from hazardous waste statutes and regulations. *See Environmental Defense Fund v. City of Chicago*, 727 F. Supp. at 424; *Wheelabrator*, 725 F. Supp. at 770. For support, both courts heavily rely on a statement in the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation. The Report stated that all waste management activities of such facilities are included within the household waste exclusion, including "the *generation*, transportation, treatment, storage and disposal of waste. . . ." S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis supplied). The *Wheelabrator* district court indicated that the Report "could not be more explicit":

> It includes the term "generation," that term upon which EDF places so much emphasis. While it is true that the legislation itself does not include the term generation and that it is the legislation with which we are concerned, the legislative history is probative on the issue of Congress' intent, given that the scope of the statute is unclear on its face.

725 F. Supp. at 765.

But was congressional intent, as suggested by the *Wheelabrator* district court, that "explicit?" On October 2, 1987, six senators and a member of the House (Representative Florio) sent two letters to Lee Thomas of the EPA. Both letters struck the same notes. Only the first letter, signed by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell, is reproduced here:

> We are writing to urge that the Agency [EPA] refrain from issuing any policy statements or legal interpretations of the Resource Conservation and Recovery Act as it relates to the management of ash generated by municipal solid waste incinerators pending further consultation and coordination with Congress. We are concerned that the Agency may be on the verge of interpreting these requirements, possibly in a manner inconsistent with the law, at a time our Committee is considering legislation specifically resolving this issue.
>
> In our view, section 3001(i) of the Solid Waste Disposal Act, often known as RCRA, as amended in 1984 does not exempt owners or operators of municipal solid waste incinerators from their obligations: 1) to determine whether the ash residues generated by the incineration process are hazardous wastes, and 2) to handle ash exhibiting hazardous waste characteristics as hazardous wastes in accordance with the requirements of Subtitle C of RCRA. Thus, we concur in the Agency's statement in the preamble to the July 15, 1985 codification rule that in the 1984 amendments Congress did *not* "exempt the regulation [sic] of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste."

Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommitee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 1-2 (May 11, 1989) ("Hearings on H.R. 2162").

In another development, on May 11, 1989, Congressman Thomas A. Luken, Chairman of the House Subcommittee on Transportation and Hazardous Materials, called a hearing on a proposed bill to regulate municipal solid

waste incinerator ash under Subtitle D of RCRA. The Congressman made the following comments in his opening statement:

> A statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. The very basic question of whether or not ash should be regulated under subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute. . . . This uncertainty has been exacerbated by conflicting signals sent by the EPA. That is not a criticism of EPA. Originally the EPA stated that incinerator ash must be tested for toxicity, and managed accordingly, but more recently the EPA has made various pronouncements which conflict with that original policy. It has become clear that legislative action is needed.

With regard to the EPA's lack of clarity on the subject, the "conflicting signals" to which Congressman Luken was referring begin with the preamble to the household waste exclusion. It most definitely exempted ash from regulation as a hazardous waste. The preamble to the regulation that mirrored section 3001(i), however, did not regard the statute as exempting from regulation ash exhibiting characteristics of hazardous waste. This difference is not explained away by later statements from EPA officials. In December 1987, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. Porter responded to a question regarding incinerator ash:

> Currently, EPA's regulations merely restate the statutory language. In the preamble codifying this statutory language, however, EPA advanced an interpretation of the statute that would subject ash residue's [sic] from energy-recovering MWC's

> [Municipal Waste Combustors] to Subtitle C regulation if the ash exhibited a characteristic of hazardous waste. The Agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion."

Hearings on H.R. 2162, 16-17 (testimony of J. Winston Porter).

Just a few months later, in May 1988, Sylvia Lowrance, who was at that time the Director of the EPA's Office of Solid Waste, offered the following testimony to the same congressional hearing:

> In our codification of [section 3001(i)] we stated that, in our view, the provision excludes energy recovery facilities burning household waste along with nonhazardous waste from commercial and industrial sources from regulation under subtitle C.
>
> With regard to the ash, however, produced from such facilities, we said in a 1985 notice that the ash generated by these facilities which exhibits a charac-

teristic of the hazardous waste must be managed as a hazardous waste.

We continue to follow that 1985 policy, and that is our current interpretation. However, there is substantial controversy surrounding that interpretation. We are in litigation challenging the EPA's interpretation of section 3001(i). We believe the law is ambiguous given it is silent with regard to treatment of ash under that section.

We do believe it needs to be clarified. What we believe is of paramount importance is that ash be safely managed in a technically sound matter [sic].

Until this legal controversy is resolved, there is going to continue to be uncertainty on the part of communities trying to deal with their garbage crisis with regard to what ultimate requirements and cost will be for their municipal and waste management.

We very much support an approach such as the one taken in H.R. 2162, which would provide clear authority to the EPA to regulate municipal combustor ash as a special waste under subtitle D of RCRA.

Id. at 33 (testimony of Sylvia Lowrance).

So there you have it. In construing a statute, we ordinarily have many tools at our disposal: the language and apparent purpose of the statute, its background and structure, its legislative history, and the bearing of relate statutes. What we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency. Where do we turn? The see-sawing statements from the EPA to which the district court gave "little weight" deserve no weight at all. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, included the generation of

waste within the household waste exclusion. Can we just ignore the Report, even though the word "generating" is nowhere to be found in the enacted statute?

It has been argued, both in this circuit and, most notably in the Supreme Court opinions of Justice Antonin Scalia, that recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor. Justice Scalia has written that use of legislative history

> is neither compatible with our judicial responsibility of assuring reasoned, consistent and effective application of [statutes], nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J. concurring in part and concurring in the judgment). And as our Broother Easterbrook has noted regarding pre-enactment legislative history,

> [it] is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history . . . , because it becomes a crutch . . . , because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process).

Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). In addition, post-enactment statements, such as we have here, bear no necessary relationship to the forces at work at the time of enactment: the preferences of the enacting legislator and his or her constituency and the impact of pressure groups.

Every time Congress enacts legislation, it is acting in context. Although "[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood," *Sinclair*, 870 F.2d at 1342, statements made before and after enactment are not necessarily the final word as to meaning. Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word "generation" was not used in the final product. Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't. The actual words of the statute—the end product of the rough-and-tumble of the political process—are the definitive statement of congressional intent.

Our task becomes simpler if we just begin with what the statute actually says. *See Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 3001(i) mentions "the treating, storing, disposing of or otherwise *managing*" of the household and commercial waste," but fails to include among these activities *generating* a different waste product entirely. To borrow a phrase from computer programmers, resource recovery quite literally is "garbage in, garbage out," but the "garbage" that emerges from the incineration process—ash—is fundamentally different in its chemical and physical composition from the plastic, paper, and other rubbish that goes in. It does not follow that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste. Such a reading of section 3001(i) would be inconsistent with RCRA's policy of encouraging the careful management of materials that pose a danger to human health and the environment.

Moreover, contrary to the City's assertions, "otherwise managing" and "generating" are not coextensive terms. Statutory construction is a holistic endeavor: the only permissible meaning is that which is compatible with the "flesh and bones" of a law, from its overarching purpose down to its individual words. Here, the individual words in RCRA are so carefully defined, they cannot be interchangeable. Hazardous waste "management" is defined to include a limited number of activities, including the "collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7) The statute goes on to define some of these terms. Two of the most important words for our purposes are defined in the following manner. "Treatment" means:

> any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any physical activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34). The term "disposal" means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). These definitions exclude "generation," which is separately defined as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6). There

is no overlap whatsoever, then, between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

We should take at face value a statute's plain language so long as our reading is not absurd; we should ignore a legislative history that results in a reading that is. It is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills. Accordingly, we hold that the ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. The decision of the district court is

REVERSED.

RIPPLE, *Circuit Judge*, dissenting. For the reasons set forth in *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991), I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC. and
CITIZENS FOR A BETTER ENVIRONMENT,
Plaintiffs,

vs.

CITY OF CHICAGO and RICHARD M. DALEY,
Mayor of the City of Chicago,[1]
Defendants.

MEMORANDUM AND ORDER

Plaintiffs Environmental Defense Fund, Inc. (EDF) and Citizens for a Better Environment (CBE) bring this action against the City of Chicago and its Mayor, seeking injunctive relief and civil penalties under Section 7002 of the Resource Conservation and Recovery Act (RCRA). Plaintiffs allege that the City has violated certain provisions of RCRA, 42 U.S.C. § 6901 *et seq.*, by generating hazardous waste and not complying with the hazardous waste requirements under RCRA, subtitle C. 42 U.S.C. §§ 6921-6939(b). We have before us plaintiffs' and defendants' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, both motions are denied and plaintiffs are granted leave for additional discovery.

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[1] Pursuant to Fed.R.Civ.P. 25(d) Richard M. Daley is substituted as a defendant in this action. He succeeds Eugene Sawyer as Mayor of the City of Chicago.

FACTS

The City is the owner and operator of a facility known as the Chicago Northwest Incinerator, located at 700 N. Kilbourn Avenue in Chicago. This was one of the first modern waste-to-energy resource recovery facilities in the United States and is the only such facility in Illinois (aff. of John Ellis, plant manager, Dept. of Streets and Sanitation, Chicago, at ¶ 3). Resource recovery facilities use highly engineered and controlled incineration technology to process solid wastes, reducing their volume and recovering usable energy in the form of steam or electricity (aff. of Mosi Kitwana, Deputy Commissioner of Sanitation, Chicago, at ¶ 10). The Northwest facility receives 200 to 250 truckloads of refuse each weekday and processes some 350,000 tons of solid municipal waste annually (Ellis aff. ¶ 7). According to Mr. Kitwana, at least 99% of the waste received at the facility consists of household waste (Kitwana aff. ¶ 14). The remainder of the waste consists of commercial waste—primarily paper and foodstuffs brought into the United States by international flights arriving at O'Hare Airport—and small quantities of contraband seized by law enforcement officials (Kitwana aff. ¶ 14). The City contends that this waste, and the small amounts of commercial waste collected in Chicago, do not contain hazardous materials.

The facility is supposed to maintain rigid inspection procedures. Household waste shipments are allegedly spot-checked to ensure that they do not contain hazardous wastes and commercial shipments carefully screened—all to prevent the acceptance of hazardous wastes (Kitwana aff. ¶ 15). Commercial waste shipments must also be approved by the Bureau of Sanitation prior to acceptance. Finally, all commercial waste is supposed to be physically examined and any hazardous materials found are to be sent back to the generator for proper disposal (Kitwana aff. ¶ 15).

Once the waste has been delivered, and inspected for hazardous materials, it is processed through the facility and reduced to an ash residue. The status of this ash is what is at issue in this matter. Plaintiffs allege that the ash is hazardous waste [2] and that the City has failed to comply with the cradle-to-grave regulatory system that governs storage, transport, disposal, and other handling of hazardous wastes. *See* 42 U.S.C. §§ 6921 *et seq.*; 40 CFR §§ 262.10 *et seq.*

The City contends that the ash remaining after incineration at the Northwest facility is from a non-hazardous waste stream and thus exempt from hazardous waste regulations. It moves for summary judgment alleging that there are no genuine issues of material fact in dispute, and that 49 U.S.C. § 6921(i) and 49 CFR § 261.4 (b)(1) specifically exclude all waste management activities of resource recovery facilities that receive household waste and non-hazardous commercial waste. On cross-motions, plaintiffs contend that the generation of toxic ash is not exempt from hazardous waste regulation and that only certain activities of resource recovery facilities are exempt.

DISCUSSION

The central issue in this action is whether the ash residue remaining after incineration is a hazardous waste under subtitle C, or only a solid waste regulated under subtitle D. Statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. Plaintiffs contend that toxic ash generated by resource recovery facilities is hazardous and subject to hazardous waste regulation. Defendants, on the other hand, contend that ash remaining after the incineration

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[2] Plaintiffs contend that 32 samples of ash generated at the Northwest Facility have been tested for toxicity pursuant to the EP toxicity test. Of those samples, 29 have exhibited levels of lead and/or cadmium that exceed the level qualifying it as hazardous waste (pl. cplt. ¶ 15).

of household and non-hazardous commercial waste is exempt from subtitle C regulation. We agree.

The Resource Conservation and Recovery Act was enacted by Congress to address our growing national solid waste crisis, to promote the protection of health and the environment, and to conserve valuable material and energy resources. 42 U.S.C. § 6902. The RCRA classifies wastes as either hazardous (regulated under C, 42 U.S.C. §§ 6921-6939(b)) or as non-harzardous (regulated under D, 42 U.S.C. §§ 6941-6949(a)). Subtitle C imposes rigorous safeguards and procedures on hazardous waste management, while D essentially forbids the disposal of solid waste in open dumps and provides significantly less regulation than C. When Congress first enacted the RCRA in 1976 it did not initially identify which wastes were subject to hazardous waste regulation. Rather, it required the EPA to develop and promulgate criteria for identifying hazardous wastes. 42 U.S.C. § 6921(a). In 1980 the EPA issued regulations identifying and listing hazardous wastes. Included in these regulations was a provision known as the "household waste exclusion." 45 Fed.Reg. 33,120 (May 19, 1980). That provision exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation and provided, in pertinent part, as follows:

> § 261.4 EXCLUSIONS
>
> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (in-

> cluding single and multiple residences, hotels and motels.)

45 Fed.Reg. 33,120 (May 19, 1980) (codified as amended at 40 CFR § 261.4(b)(1) (1982).

In the preamble to these regulations the EPA restated its view that ash from the incineration of household waste should be excluded from hazarodus waste regulation, stating:

> The Senate language makes clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded in all phases of its management, *residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as a hazardous waste.* Such wastes, however, must be transported, stored, treated and disposed in accord with the applicable state and federal requirements concerning the management of solid waste . . . .

45 Fed.Reg. 33,098 (May 19, 1980) (emphasis added). When Congress amended the RCRA in 1984 to clarify the household waste exclusion, it left unmodified the EPA's 1980 interpretation that ash from the incineration of household waste should be excluded from hazardous waste regulation. 42 U.S.C. § 6921(i). Additionally, Congress expanded this exclusion to include resource recovery facilities that also burn non-hazardous commercial or industrial solid waste. The statute currently reads:

> (i) *Clarification of Household Waste Exclusion*
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this seection, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i) (1984).

The fact that Congress amended the RCRA without directly renouncing the EPA's 1980 interpretation that ash from household waste is excluded from hazardous waste regulation is significant. "Congressional failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), *rev'd on other grounds*, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981)). Congress having left untouched the EPA's 1980 interpretation is persuasive evidence that it intended to exclude ash such as this from subtitle C regulation.

Plaintiffs argue, however, that Congress did not intend the household waste exclusion to apply to generators of hazardous wastes such as defendants. According to plain-

tiffs, the 1984 amendment exempts only certain activities of resource recovery facilities (namely the treating, storing, disposing of or otherwise managing certain specified wastes) and does not exclude the generation of hazardous waste. Indeed, the current RCRA statute contains no language indicating that waste such as ash, generated by resource recovery facilities, should be excluded from hazardous waste regulation. Therefore, plaintiffs' claim that defendants must comply with the RCRA's hazardous waste requirements because the ash defendants are generating is hazardous. We find this reasoning unpersuasive.

When Congress amended the RCRA and clarified the household waste exclusion, it meant to exclude all of the waste management activities of a resource recovery facility from subtitle C regulation. This interpretation is consistent with the RCRA's stated policy goal of encouraging commercially-viable resource recovery facilities and removing impediments which may hinder their development and operation. The Senate Report which accompanied the 1984 RCRA amendments supports this reading and, in fact, defines the waste management activities of a resource recovery facility to include generation. The report provides that

> [a]ll waste management activities of [resource recovery facilities,] including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .

S.Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

That the EPA 1980 household waste exclusion does not include the words "generation" or "ash," but nevertheless excludes the generation of ash from hazardous waste regulation, provides further support that Congress meant to exclude ash generated from household wate from subtitle C. *See* 45 Fed.Reg. 33,120 (May 19, 1980). Plaintiffs

do not dispute that the EPA initially interpreted the household waste exclusion as excluding all of the waste management activities of municipal incinerators accepting only household wastes. In fact, plaintiffs concede that the 1980 household waste exclusion was a "waste stream" exclusion (pl. mem. at 20). Nonetheless, plaintiffs contend that the 1984 RCRA statute does not pertain to the entire waste stream but, rather, is limited to a class of resource recovery facilities that must meet certain requirements. We disagree. Because the original household waste exclusion covered the management of ash residue, and the 1984 clarifiction left untouched this interpretation, we conclude that Congress must have meant to adopt the EPA's position. Had Congress intended to change this interpretation, it would have so indicated in the 1984 amendment.

The United States Conference of Mayors and the National Resource Association have filed an amicus brief in support of the City's position and the Institute of Resource Recovery has done likewise.[3] They claim that landfill capacity for hazardous wastes is limited, is being rapidly depleted and is not being replaced, and that a requirement that ash be disposed of as a hazardous waste would imperil the entire resource recovery program. Plaintiffs dispute that gloomy assessment. Whether that assessment is true or not, we are not persuaded that Congress changed obligations by implication and without specifically addressing and rejecting those concerns.

Since the 1984 amendment, the EPA has issued new regulations interpreting the household waste clarification provision. 40 CFR 261.4(b)(1) (1985). Plaintiffs argue that these regulations provide further support that Congress did not intend to exclude the generation of ash from hazardous waste regulations. In the preamble to these regulations, the EPA seemed to believe that the 1984 stat-

[3] We here grant their motions to file those briefs.

ute modified the earlier policy on ash. The EPA stated that it did not see the 1984 amendments as an attempt to exempt the regulation of ash residue.[4] *See* 50 Fed.Reg. 28,726 (1985). Recent statements from some EPA officials, following the issuance of the 1985 regulations, have also indicated that the EPA does not consider ash to be exempt from hazardous waste regulation. *See* Testimony of Sylvia Lowrance, Director, Office of Solid Waste, EPA, at *Regulation of Municipal Solid Waste Incinerators: Hearing Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Congress, 1st Session (May 11, 1989).

Other EPA officials who have examined the 1985 interpretation have concluded that that interpretation, however, may have been in error. On December 3, 1987, J. Winston Porter, assistant administrator for Solid Waste

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[4] The EPA interpreted the clarification as follows:

> The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of those resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metal become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes could not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

50 Fed.Reg. 28,725-26 (7/15/85).

and Emergency Response, testified before the Senate Committee on Environment and Public Works and stated that

> [t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) [42 U.S.C. § 6921(i)] were probably intended to exclude these ash resides from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion . . . ."

S.Rep. at 61.

In addition, after stating in the 1985 interpretation that it did not perceive the RCRA amendments as an attempt to exempt the regulation of ash residue, the EPA indicated its confusion on the matter by stating that it

> does not believe the HSWA [1984 Hazardous and Solid Waste Amendments] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to

> await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed.Reg. 28, 726 (1985).

As the agency primarily responsible for administering the RCRA, the EPA should be entitled to some deference in its interpretations regarding the regulation of ash residue. However, because the EPA's classification of ash rests on a questionable reading of the statute and has been, at best, inconsistent, it should be given less weight than it would normally be accorded.[5] *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1986) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view"). For this reason, we find that the EPA's 1985 interpretation—classifying ash from household and commercial waste as hazardous if it exhibits characteristics of toxicity—does not affect our decision.

Thus, contrary to plaintiffs' interpretation of RCRA, we conclude that ash remaining after the incineration of household waste and non-hazardous commercial waste is exempt from regulation if the resource recovery facility satisfies the criteria of § 3001(i).

Defendants insist that the Chicago Northwest Incinerator does meet those criteria and have submitted affidavits to the effect that virtually all the waste received and burned is household waste, that the very limited

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[5] Even if the EPA's 1985 interpretation was entitled to deference in these proceedings, it would not be binding on this court. "Interpretative rules are statements as to what the administrative officer thinks the statute or regulation means, whereas legislative rules have effects *completely independent* of the statute." United Technologies Corp. v. United States Environmental Agency, 831 F.2d 714, 718 (D.C. Cir. 1987) (citations omitted) (emphasis in original).

commercial and industrial waste processed does not contain hazardous wastes, that the facility does not accept hazardous wastes and that appropriate procedures are in place to assure that hazardous wastes are not received at or burned in the facility. Plaintiffs dispute those conclusions but they can, for now, point to little other than the toxicity tests to support their disagreement. Until now the focus of this lawsuit has been the statutory interpretation issue. Plaintiffs have lost on that issue. They are not foreclosed, however, from conducting reasonable discovery to test the defendants' affidavit assertions. Rule 56(f) so permits. Until they have had an opportunity to do so, we cannot conclude that defendants, beyond reasonable dispute, have complied with the conditions needed to exempt resource recovery facilities from hazardous waste regulation when burning household and commercial waste. Although defendants maintain that the incinerator does not accept hazardous wastes, and that they have established sufficient notification and inspection procedures to prevent this, these issues must be regarded as disputed issues of material fact that preclude the award of summary judgment.

CONCLUSION

For the foregoing reasons, both plaintiffs' and defendants' cross-motions for summary judgment are denied; plaintiffs are granted leave for additional discovery.

/s/ James B. Moran
JAMES B. MORAN
Judge
United States District Court

November 29, 1989.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*

v.

CITY OF CHGO *et al.*

JUDGMENT IN A CIVIL CASE

[Docketed Aug. 21, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That based upon the Memorandum and Order of November 27, 1989, the stipulation of the parties and defendants' renewed motion for summary judgment, the renewed motion for summary judgment is granted, without prejudice to plaintiffs' right to appeal the final judgment entered herein.

Date: August 20, 1990

H. STUART CUNNINGHAM
Clerk

/s/ Willie A. Haynes
WILLIE A. HAYNES
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 0769

Judge James B. Moran

ENVIRONMENTAL DEFENSE FUND, INC.
and CITIZENS FOR A BETTER ENVIRONMENT,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

STIPULATION OF PLAINTIFFS ENVIRONMENTAL DEFENSE FUND AND CITIZENS FOR A BETTER ENVIRONMENT AND DEFENDANTS CITY OF CHICAGO ET AL. WITH REGARD TO ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

1. On November 27, 1989, this Court ruled herein that, as a matter of law, ash generated by the Northwest Waste-to-Energy Facility ("Facility") owned by defendant City of Chicago is exempt from regulation as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act ("RCRA") if defendants meet the two statutory conditions set forth in section 3001(i) of RCRA. Memorandum Opinion and Order of November 27, 1989. Those conditions pertain to the existence of contracts or other appropriate procedures to assure that the Facility does not receive or process hazardous wastes, and to non-acceptance of hazardous wastes by the Facility. The Court directed the parties to engage in discovery

with regard to whether the Facility meets these two statutory conditions.

2. Subsequent to issuance of the Court's Memorandum and Order, discovery has been completed.

3. Defendants stipulate that, within 60 days of the entry of this Stipulation they will implement the changes specified in Attachment A to this Stipulation.

4. Contingent upon defendants' performance of the condition stated in paragraph 3 of this Stipulation, plaintiffs hereby stipulate that they will not contest, challenge, or otherwise pursue in this litigation:

(a) the adequacy of the Facility's current procedures for excluding hazardous wastes;

(b) whether the Facility currently accepts hazardous wastes for processing;

(c) the adequacy of the Facility's prior procedures for excluding hazardous wastes;

(d) whether the Facility previously accepted hazardous wastes for processing.

5. Contingent upon defendants' performance of the conditions stated in paragraph 3 of this stipulation, plaintiffs further stipulate that they will not oppose a renewed motion by defendants for entry of summary judgment in favor of defendants. In so stipulating, plaintiffs expressly reserve their right to appeal the final judgment insofar as the judgment rests upon the rulings set forth in the Court's Order and Memorandum of November 27, 1989.

Respectfully submitted,

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Dated: July 2, 1990

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June 27, 1990

ATTACHMENT A

To the Acceptable Waste Certification form used by the City of Chicago at the Northwest Waste-to-Energy Facility, the following material underlined shall be added to the form, and material bracketed shall be deleted as follows:

"Hazardous waste defined as a waste or combination of wastes, which has been identified by characteristic or listing as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board, [and which poses a threat to health and safety].

". . . .

"Oil, cesspool or other human wastes . . . *and small quantity generator wastes as defined at 40 C.F.R.* sec. 260.10."

CITY OF CHICAGO
DEPARTMENT OF STREETS AND SANITATION
ACCEPTABLE WASTE CERTIFICATION

DATE MONTH DAY YEAR

I understand that the Northwest Waste-to-Energy Facility accepts only household waste and non-hazardous and otherwise acceptable commercial and Industrial waste, and that under no circumstances will the Northwest-Waste-to-Energy Facility accept any of the following unacceptable waste:

Hazardous waste, defined as a waste or combination of wastes which has been identified, by characteristic or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board.

Any waste which because of its nature or bulk will adversely affect operation of the facility .

Oil, cesspool or other human wastes, human and animal remains, hospital or medical waste, wire and cable, tree logs and wood greater than twelve inches in diameter, liquid waste, non-burnable construction material and/or demolition debris, asbestos and asbestos products, explosives including ammunition and fire arms, chemicals including any empty containers thereof, such as cleaning fluid, flammables, petroleum products including drained oils, paints, acids, caustics, pesticides, insecticides, poisons, drugs, and small quantity generator wastes as defined in the resource conservation and recovery Act (RCRA) at 40 C.F.R. section 260.10.

I hereby certify that the waste delivered in this vehicle contains no unacceptable waste, as defined above. I understand that should the operators of the Northwest

Waste-to-Energy Facility discover unacceptable waste in this vehicle, that it will not be disposed of at the Northwest Waste-to-Energy Facility and must be returned to the owner.

DRIVER _____ TIME STAMP

VEHICLE LICENSE NO. _____

WASTE AUTHORIZATION FORM #_____

Supreme Court, U.S.
FILED
APR 20 1992
OFFICE OF THE CLERK

(4)

No. 91-1328

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CHICAGO, et al.,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), exempts a resource recovery facility, which generates a hazardous waste ash residue from its incineration of municipal solid waste, from the requirements of Subtitle C of RCRA applicable to hazardous waste generators.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1328

THE CITY OF CHICAGO, ET AL.,
PETITIONERS
v.
ENVIRONMENTAL DEFENSE FUND, INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 948 F.2d 345 (7th Cir. 1991). The district court's memorandum opinion and order of November 29, 1989 (Pet. App. 18a-29a) is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. The petition for a writ of certiorari was entered on February 18, 1992. The jurisdiction of this court is invoked under 28 U.S. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(i), provides:

> **(i) Clarification of household waste exclusion**
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, sorting, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--
>
> (1) such facility--
>
> (A) receives and burns only--
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous waste identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7) provide:

> (6) The term "hazardous waste generation" means the act or process of producing hazardous waste.
>
> (7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

STATEMENT

Respondents Environmental Defense Fund, Inc. and Citizens For A Better Environment brought this action, asserting that petitioner City of Chicago[1] is violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to comply with that Act's Subtitle C hazardous waste requirements in the City's handling of the hazardous waste ash residue generated by its operation of a municipal solid waste facility.[2] The district court granted the City's motion for summary judgment, agreeing with the City that Section 3001(i) of RCRA

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[1] Petitioners City of Chicago and Richard M. Daley, Mayor of the City of Chicago, are referred to collectively in this submission as either "the City" or "petitioner."

[2] Subtitle C of RCRA establishes a regulatory scheme governing those "solid wastes" that constitute "hazardous wastes" and Subtitle D imposes a distinct, less rigorous, regulatory regime on "solid wastes" that are not "hazardous." *Compare* 42 U.S.C. 6921-6939 (Subtitle C) *with* 42 U.S.C. 6941-6949 (Subtitle D).

exempts the City's resource recovery facility, and the ash generated by it, from Subtitle C's requirements applicable to hazardous waste generators. The court of appeals reversed.

1. The City of Chicago owns and operates a municipal solid waste resource recovery facility at which it incinerates solid waste collected from households and commercial enterprises located throughout the City. The resource recovery facility receives 200 to 250 truckloads of refuse each day, totalling 350,000 tons of waste per year. The facility in turn generates 110,000 to 140,000 tons of ash, the toxicity of which is routinely high enough to qualify it as a "hazardous waste" subject to the requirements of Subtitle C of RCRA. Between 1981 and 1987, 32 out of 35 samples of ash tested exhibited sufficiently high concentrations of lead, cadmium, or both to be classified a hazardous waste under established EPA testing procedures. Pet. App. 2a.

The City, however, has not in the past, and does not currently comply with Subtitle C in its treatment, storage, or disposal of the hazardous ash. Pet. App. 3a. The City has not, as is required of generators of hazardous waste, applied for and received a United States Environmental Protection Agency identification number prior to engaging in any of these regulated activities with the ash that the City has generated. See 40 C.F.R. 262.12. The City likewise does not purport to comply with packaging and labelling requirements, or with container requirements, applicable to hazardous wastes. See 40 C.F.R. 262.30-33.

Nor is either the waste hauler hired by the City to transport the hazardous ash, or any of the facilities

at which the ash has been ultimately disposed, licensed to accept hazardous waste. Until 1987, the City sent its ash to a former limestone quarry, which lacked any liner. R12 at ¶ 16.[3] The City currently sends the ash to a sanitary landfill in Michigan that fails to conform with the basic design elements of hazardous waste landfills. R.34 at ¶ 24. Among other shortcomings, there is no double liner or double leachate collection system, both of which are required in licensed hazardous waste landfills to guard against the migration of hazardous constituents into any nearby groundwater supplies. *Id.*

2. On January 27, 1988, respondents filed a complaint against the City, alleging that the City was violating Subtitle C of RCRA by unlawfully storing, transporting, disposing, and otherwise handling hazardous ash generated at the City municipal solid waste resource recovery facility. The City filed a motion for summary judgment, relying on RCRA Section 3001(i), which provides that a resource recovery facility that receives and burns only household waste and nonhazardous solid waste from commercial or industrial sources "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" to the extent that the facility is "recovering energy from the mass burning of municipal solid waste." 42 U.S.C. 6921(i).[4] The City

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[3] "R12" refers to the item number in the record below. Record cities derive from the brief filed by respondents in the Court of Appeals.

[4] Pursuant to Section 3001(i), the facility must not only be a "resource recovery facility," but in addition, the facility owner or operator must have an established program or procedure "to

did not contest respondents' claim that the concentrations of hazardous constituents in the ash render it a "hazardous waste," within the meaning of RCRA. Nor did the City contest respondents' assertion that the City was not complying with RCRA's Subtitle C requirements. Pet. App. 2a-3a, 18a-19a.

The district court granted the City's motion for summary judgment. Pet. App. 30a. The court concluded that Congress must have intended to exclude hazardous ash generated by the resource recovery process because in 1980, prior to congressional enactment of Section 3001(i) in 1984, EPA had "exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation." Pet. App. 21a, citing 45 Fed. Reg. 33,120 (1980). According to the district court, "Congress having left untouched the EPA's 1980 regulation is persuasive evidence that it intended to exclude ash such as this from Subtitle C." Pet. App. 23a. The court declined to give any deference to EPA's official statement, made subsequent to Section 3001(i)'s enactment, that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." Pet. App. 25a-26a & n.4, quoting 50 Fed. Reg. 28725-28726 (1985).

3. The court of appeals reversed. Pet. App. 1a-16a. The court concluded that the district court's

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assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. 6921(i).

reliance on EPA's 1980 regulation was misplaced, because "Congress never ratified th[e 1980] statement in the form of legislation." *Id.* at 6a. Looking to "what the statute actually says," the court of appeals found dispositive that "Section 3001(i) mentions 'the treatment, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among those activities *generating* a different waste product." *Id.* at 14a (emphasis in original). "It does not follow," the court reasoned, "that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.*

The court also stressed that, "contrary to the City's assertions, 'otherwise managing' and 'generating' are not coextensive terms." Pet. App. 15a. They are each "carefully defined" in a way that prevents them from being "interchangeable." *Id.* Hazardous waste "generation" is deliberately excluded from the statutory definition of "management," which is defined "to include a limited number of activities, including the 'collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.'" *Id.*, quoting 42 U.S.C. 6903(7). "It follows, therefore, that if the language of exclusion is limited to 'management' activities of resource recovery facilities, 'generating' activities are subject to regulation." Pet. App. 16a.[5]

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[5] Judge Ripple dissented. Pet. App. 17a.

DISCUSSION

The petition for a writ of certiorari should be granted. Although we believe that the judgment of the court of appeals should be affirmed, we agree with petitioner that the decision of that court conflicts with the decision of another court of appeals and that the existing conflict in the circuits presents an important issue of federal law warranting this Court's plenary review.

1. As described by petitioner (Pet. 10), "[t]he Second and Seventh Circuits have reached diametrically opposed interpretations of Section 3001(i) of RCRA." The Seventh Circuit in this case held that Section 3001(i) does not exempt from RCRA Subtitle C's hazardous waste regulations the hazardous ash generated by a municipal resource recovery facility burning household waste and commercial nonhazardous waste. According to the court below, Section 3001(i) simply exempts the resource recovery facility's management of the household waste it *receives and burns*, notwithstanding the hazardous characteristics of that household waste, as long as the facility operators take appropriate actions to ensure that any commercial or industrial waste mixed with that household waste is not itself hazardous. Where, however, as in this case, the incineration of that waste produces a new waste that itself is "hazardous," within the meaning of RCRA, Subtitle C's requirements apply to that new waste.

The Second Circuit in *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir.), cert. denied, 112 S.Ct. 493 (1991), embraced the opposite view. As described by the Seventh Circuit

below, "[t]he Second Circuit * * * concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste." Pet. App. 4a, citing *Wheelabrator*, 931 F.2d at 213. Because, moreover, the court below specifically rejected that holding, the court circulated its opinion to all of the judges of that court for their possible rehearing *en banc* in light of the circuit conflict created. None favored such a rehearing. Pet. App. 1a n.*.

2. We also agree with petitioner that the regulatory scope of Subtitle C renders "intolerable" a circuit conflict regarding its application (Pet. 11). Subtitle C does not simply impose a set of requirements on geographically localized activities in different states. Subtitle C applies to companies engaged in commerce in hazardous waste treatment, storage, and disposal, much of which crosses state borders. Indeed, the very reason why Congress enacted RCRA and Subtitle C was the predominantly interstate nature of commerce in hazardous waste management. See H.R. Rep. 94-1491, 94th Cong., 2d Sess. 9-10, 24-28 (1976). Congress recognized that "uniformity" was an essential element of any comprehensive scheme designed to protect human health and the environment from the risks presented by such wastes. See *id.* at 30. The conflict between the Second and Seventh Circuits, however, destroys that essential element of the federal statutory scheme.

The existing circuit conflict also presents the kind of conflict that warrants this Court's resolution at this time. There is no reason to suppose that one of the two conflicting circuits may change its view. Both are

recent rulings, and there have been no significant intervening developments. Nor does the fact that Congress is currently contemplating RCRA's amendment in its reauthorization process provide any substantial basis for anticipating that Congress will address this issue any time in the near future. See Pet. 17 n.6. Congressional reauthorizations of federal environmental laws are notorious both for their prolonged delays, and the unpredictability of their substantive amendments in the legislative process. RCRA is itself a good example. Its authorization for appropriations expired four years ago in 1988. See 42 U.S.C. 6916(a) (1988).[6]

3. We also agree with petitioner that this case presents an important issue of federal law warranting this Court's review, wholly apart from the practical problems presented by the conflict now existing between the Second and Seventh Circuits. The environmental consequences at stake, moreover, render this Court's review now particularly pressing.

As petitioner acknowledges (Pet. 3), there were 137 resource recovery facilities operating in the United States as of November 1991, and 68 additional facilities in the planning or construction stage. These facilities generate millions of tons of ash residue each year. The facility at issue in this case by itself generates up to 140,000 tons of ash each year. Pet. App. 2a. Under the Second Circuit's view, that ash, no matter how hazardous its composition, is exempt

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[6] Congress similarly needed 13 years (between 1977 and 1990) to reauthorize and amend the Clean Air Act, 42 U.S.C. 7401 *et. seq.*, which was supposed to be reauthorized after only four years. See 42 U.S.C. 7426 (1988).

from the stringent requirements that Congress deemed absolutely essential for safeguarding human health and the natural environment.[7]

Hazardous ash from resource recovery facilities burning municipal solid waste is therefore currently being stored in containers not deemed suitable for hazardous waste. The ash is being transported in a manner that the government has determined is inadequate for hazardous waste. And, the ash is ultimately being disposed of in a manner that does not meet the minimum requirements of safety applicable to the disposal of wastes containing such hazardous constituents. In some instances, the inevitable harms

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[7] For that reason, moreover, the Second Circuit's view in *Wheelabrator* is doubly flawed. Not only did that court incorrectly conclude that Section 3001(i)'s exemption extends to the generation of hazardous ash, but the court also failed to consider the practical consequences of the regulatory regime that it was creating. Even assuming, that the exemption does (contrary to our view) apply to the newly-generated ash, Section 3001(i) cannot fairly be construed as purporting to allow any party other than the resource recovery facility itself to entertain the fiction that the ash is not hazardous waste. The "resource recovery facility recovering energy from the mass burning of municipal solid waste" is the only entity mentioned in Section 3001(i) that "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle." 42 U.S.C. 6921(i). There is no parallel exemption for any other entity that is subsequently "treating, storing, disposing of, or otherwise managing" the hazardous ash. Of course, as petitioner would no doubt respond, such a bifurcated statutory exemption is unworkable and makes no sense (*e.g.*, how would a transporter know that it was receiving a hazardous waste if the Subtitle C manifest system requirements did not apply to the generator of the waste in the first place). But that is the very reason why it is wrong to conclude that Congress intended to extend the exemption to the generation of ash at all (see pages 12-17, *infra*).

that result from these dangerous practices may be susceptible to some remedial action, albeit at tremendous costs. In many others, however, the damage is likely to be irreversible both in terms of human health and the environment.

To be sure, the Seventh Circuit's favorable ruling reduces somewhat the magnitude of that threat. But, absent this Court's review, there will be no opportunity to challenge the practices of resource recovery facilities operating within the Second Circuit and thereby redress the growing threat that they present to persons exposed to their hazardous wastes. Hence, the seriousness of those risks further counsels against this Court's delaying review of the issue presented in this case.

4. Finally, although we agree that the petition should be granted, we believe that the decision of the court of appeals below is correct and its judgment should therefore be affirmed.

Petitioner's entire legal argument rests on the erroneous proposition that Congress intended to promote resource recovery facility incineration of municipal solid waste (i.e., household waste and nonhazardous commercial waste) in two distinct ways: (1) exempt those facilities from the strict Subtitle C requirements applicable to those transporting, treating, storing, or disposing of hazardous wastes in the facilities' *receipt* of municipal solid waste for the purpose of recovering energy from its mass burning; and (2) exempt those facilities in their *production* of hazardous ash from the strict Subtitle C requirements applicable to those who generate a new hazardous waste, even when those wastes would otherwise

constitute "hazardous wastes," within the meaning of RCRA.

The practical implications of these two possible exemptions are enormously different. The first is not particularly controversial, even though household wastes include hazardous materials. Because the resource recovery facility incinerates the municipal solid waste that it receives, the human health and environmental risks associated with exempting its mere receipt from Subtitle C are relatively confined both geographically and temporally. The financial savings to the resource recovery facility, however, may be substantial.

By contrast, the human health and environmental risks associated with the second kind of exemption, proposed by petitioner, are far greater in their potential magnitude. Those risks do not end at the resource recovery facility. That is instead where they begin. Under petitioner's reading, the operator of the facility is permitted to transport, treat, store, and arrange for the disposal of a hazardous waste throughout the nation pretending as if it does not contain the hazardous constituents that the waste in fact contains.

We do not question petitioner's claim (Pet. 14-16) that Congress intended to promote resource recovery facilities. And we certainly agree with petitioner's characterization of the hazardous waste management issues faced by this country as a "crisis." (Pet. 14). But, as the court concluded (Pet. App. 16a), it would seem "unlikely," if not entirely "absurd," to suppose "that Congress, in an express effort to promote the proper disposal of dangerous substances

that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills."

It is therefore not surprising that RCRA admits of no such construction. Section 3001(i) expressly endorses only the first, relatively confined exemption. It exempts the resource recovery facility from Subtitle C in its receipt and burning of wastes, by providing that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing or, otherwise managing hazardous waste for the purposes of regulation under this subchapter." Omitted from the statutory language is any reference to exempting the facility from Subtitle C requirements applicable to the "generation" of a new hazardous waste in the event that the ash produced contains high levels of hazardous constituents.

Contrary to petitioner's claim, moreover, the reference in Section 3001(i) to "otherwise managing" cannot be reasonably read as embracing "generation." In RCRA, Congress carefully and precisely defined the terms "management" and "generation" in a manner that provides, as the court of appeals explained, for "no overlap whatsoever" (Pet. App. 16a).[8] No doubt Congress did so to avoid the very absurdity that

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[8] RCRA defines the term "hazardous waste generation" as meaning "the act or process of producing hazardous waste." 42 U.S.C. 6903(6). "Hazardous waste management" is defined to mean "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. 6903(7).

petitioner nonetheless insists was the legislature's intent.[9]

Finally, petitioner's reliance on both the EPA's construction of Section 3001(i) and the legislative history to defeat the plain, unambiguous meaning of the statutory language is misplaced. EPA has addressed the meaning of Section 3001(i) only once since its enactment in the kind of official manner that this Court accords deference. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 467, 842-845 (1984); *cf. Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). And on that occasion, EPA left no doubt regarding its view: "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of a hazardous waste." 50 Fed. Reg. 28726 (July 15, 1985).[10]

The legislative history is likewise unavailing to petitioner. To be sure, Congress was aware, prior to

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[9] Petitioner mistakenly assumes that because the *management* of one kind of hazardous waste may result in the *generation* of another kind of hazardous waste that a statutory exemption applicable to the former activity must extend to the latter as well. The short answer is that such an assumption is improper where the two activities trigger distinct statutory requirements directed to different kinds of risks. Notions of proximate cause are no substitute in these circumstances for clear statutory definitions.

[10] Of course, because the statutory language unambiguously supports our view that Section 3001(i)'s exemption does not apply to the generation of a new hazardous waste, any EPA interpretation to the contrary would have to be rejected in any event. Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

passing Section 3001(i), that EPA had previously created an administrative exemption from Subtitle C for household wastes that purported to extend to the "residues remaining after * * * incineration." 45 Fed. Reg. 33120 (1980). But, as explained by the court of appeals below, that is the very reason why Congress cannot be deemed to have embraced that same view:

> Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word 'generation" was not used in the final product. * * * The actual words of the statute -- the end product of the rough-and-tumble of the political process -- are the definitive statement of congressional intent.

Congress, in short, rejected EPA's 1980 approach in its enactment of Section 3001(i) in 1984.[11] Hence,

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[11] The court of appeals also well explained why petitioner's reliance on a legislative report's addition of the term "generation" to those activities exempted from Subtitle C is unpersuasive: "Why should we, then, rely upon a single word in a committee report that did not result in legislation. Simply put, we shouldn't." Pet. App. 14a. Of course, we may never know precisely why those committee staffers who drafted the report were apparently unable to muster the support necessary to include "generation" in the statute itself. But where, as in this case, that addition portends such a significant expansion in the scope of Section 3001(i)'s reach, the resulting distinction between statute and report must be dispositive. Significantly, Congress has shown itself capable in the RCRA context of an exemption that, unlike Section 3001(i), expressly extends to the activity of generation. See 42 U.S.C. 6921 note (emphasis added) ("owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating*, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of [Subtitle C]").

petitioner's complaint, if any, is more appropriately directed to Congress, rather than to the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 91-1328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash residue from the burning of municipal solid waste at such a facility.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are organizations whose members include state, county and municipal governments and officials throughout the United States. The National League of Cities ("NLC") is a not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Almost 15,000 municipalities are members of and participate in the activities of the NLC. The National

Association of Counties ("NACo") is the only national organization representing county government in the United States. NACo represents over 1900 counties, and through them approximately 90% of the United States population. The members of NLC and NACo have a compelling interest in the legal issues pertaining to the incineration of municipal solid waste ("MSW") and the interpretation of the Clarification of Household Waste Exclusion found in Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).[1]

The Court has recognized in the past that sanitation is a traditional function of local government and that local government bears the financial burden of this responsibility.[2] Cities and counties around the country, faced with diminishing MSW landfill capacity, increasing landfill tipping fees and great difficulties in siting new landfills, have invested heavily in resource recovery and combustion systems to manage MSW. Thus, 176 MSW combustors, owned both by local governments and private companies, now handle 17% of the MSW generated in the United States. Because each of these facilities, including those privately owned, serves the MSW management needs of local governments, and because these facilities represent tremendous capital investments by local governments, *amici* and their members have a great financial stake in the outcome of this litigation. In addition to their financial interests in the issues presented in this case, *amici* have an interest in protecting municipal decisionmaking on local waste management issues. Because the Seventh Circuit's decision below will impose substantial additional costs on jurisdictions which oper-

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2.

[2] *See National League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (sanitation is "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services"); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

ate resource recovery facilities, in many situations making further use of the facility economically infeasible, local autonomy over MSW management is imperilled.

SUMMARY OF ARGUMENT

Below, the Seventh Circuit concluded that the exemption from the hazardous waste regulatory regime which Congress extended to resource recovery facilities burning MSW under Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), *see* App. A, *infra*, did not include the ash produced from burning MSW. Not only is this decision inconsistent with the language of Section 3001(i) and its legislative history, but the consequence of the decision will defeat the very purpose for which Congress adopted the exemption.

Starting with the enactment of RCRA in 1976, and through two sets of amendments in 1980 and 1984, Congress sought to keep the management of MSW separate and apart from the regulatory regime relating to hazardous waste. Congress also sought to encourage local governments to burn MSW at resource recovery facilities to promote the generation of energy and to save scarce landfill space. To that end, Congress in 1984 adopted Section 3001(i), which expressly exempts all operations of MSW resource recovery facilities from RCRA's hazardous waste regulatory program.

If the Seventh Circuit's decision is not reversed, there will be a substantial disincentive for local governments to use resource recovery facilities to handle their MSW. From an economic standpoint, it is simply cheaper for many local governments to dispose of untreated MSW in a sanitary landfill than to burn the same material in a resource recovery facility and dispose of the ash in a hazardous waste landfill. If the Seventh Circuit's decision stands, local governments will be obliged by economic considerations to choose landfilling of untreated MSW over the use of resource recovery facilities, very few new resource recovery facilities will be built, and the limited

space available for landfilling will be more quickly exhausted. Thus, the Seventh Circuit's interpretation of Section 3001(i) defeats the statute's overriding purpose.

Currently, there is a conflict between the Seventh Circuit's decision in this case and the decision of the Second Circuit in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991), which held that the ash from a resource recovery facility is covered by the exemption in Section 3001(i). Because of the conflict, local governments outside of the Second and Seventh Circuits are faced with uncertainty about the legal requirements which relate to their handling of the ash. The uncertainty interferes with their ability to formulate plans for handling MSW in a lawful, but cost-effective manner, discourages investments in new resource recovery facilities, and exposes cities and counties to lawsuits.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THE SEVENTH CIRCUIT'S HOLDING WILL EXACERBATE THE CURRENT SHORTAGE OF LANDFILL SPACE, MAKE UNCERTAIN THE ECONOMIC VIABILITY OF RESOURCE RECOVERY FACILITIES, AND IMPOSE SIGNIFICANT COSTS ON LOCAL GOVERNMENTS

A. Resource Recovery Is An Important Aspect of MSW Management

This country faces a significant landfill crisis. While there were approximately 10,000 operating MSW landfills in 1970, only approximately 6,500 remained in operation by 1988.[3] Many of these will be forced to close as a con-

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[3] 56 Fed. Reg. 50,978, 50,988 (Oct. 9, 1991); U.S. Environmental Protection Agency, *EPA/530-SW-88-011A, Report to Congress, Solid Waste Disposal in the United States, Executive Summary* at 1 (Oct. 1988).

sequence of regulations promulgated by the Environmental Protection Agency ("EPA") in 1991.[4] As rapidly as landfill capacity has decreased, tipping fees at remaining MSW landfills have increased. Between 1988 and 1990 average tipping fees increased 17% nationally.[5] Moreover, the landfill crisis is compounded by severe regional capacity shortages, prompting many cities and counties to ship MSW to distant jurisdictions or across state lines and thereby adding significant transportation costs as well as disposal surcharges. For instance, a 1989 study reported that 11 New Jersey counties shipped their MSW out of state and that over half the state's refuse was sent to other regions of the country.[6]

Incineration has played a significant role in MSW disposal. In 1938, approximately 600 to 700 cities and towns burned their garbage and rubbish.[7] However, use of incineration waned as landfilling became more economical, and by 1974 only 160 incinerators and resource recovery facilities were in operation.[8] Today, resource recovery facilities and incinerators have again become a vital part of the MSW management system. They are increasingly important and popular due to the shortage and expense of landfill space. Incineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%.[9] Jurisdictions which burn portions of their MSW streams and then

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[4] *See* 56 Fed. Reg. at 50,992.

[5] National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991). In the midwest and the mid-Atlantic regions of the country, fees increased by 31% and 20%, respectively.

[6] National Solid Wastes Management Association, *Landfill Capacity in the Year 2000*, at 5 (1989).

[7] Martin V. Melosi, *Garbage in the Cities* 217 (1981).

[8] *Id.*

[9] Homer A. Neal & J.R. Schubel, *Solid Waste Management and the Environment, the Mounting Garbage and Trash Crisis* 117 (1987).

landfill the remaining ash reduce landfill tipping fees and transportation costs significantly. In 1991, 176 resource recovery facilities and incinerators burned more than 31 million tons of MSW, or 17% of the nation's total MSW stream.[10] If the 68 projects currently in planning and construction stages are completed, capacity will be increased to 53 million tons per year, or 24% of the estimated total volume of MSW that will be generated in the year 2000.[11]

In addition to saving landfill space, resource recovery facilities provide substantial other environmental and economic benefits. One ton of MSW burned in a resource recovery plant provides enough energy to light one thousand 100-watt light bulbs for one hour, power 500 hair dryers for one hour, or furnish electricity to an ordinary apartment for one month.[12] A portion of the energy generated by resource recovery facilities is used to operate the plants themselves, making the facilities self-sufficient, and the remainder is sold and the proceeds applied to the facility's operating expenses, further reducing the cost of MSW disposal to local government.

B. Classifying MSW Ash as a Subtitle C Waste Will Create a Disincentive to Resource Recovery

If MSW ash is reclassified as a hazardous waste, resource recovery facility operators will be required to dispose of that ash only at landfills which have obtained applicable state or federal treatment, storage and disposal permits under the strict requirements of Subtitle C of RCRA. 42 U.S.C. §§ 6924, 6925. As a consequence of the stricter environmental control requirements and the added risk of liability inherent in handling hazardous

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[10] Jonathan V.L. Kiser, *Municipal Waste Combustion in the United States: An Overview*, Waste Age, Nov. 1991, at 27.

[11] *Id.*

[12] Neal & Schubel, *supra* note 9, at 108.

wastes, the cost of disposing of MSW ash in a hazardous waste landfill will be substantially greater than the cost of putting the ash in MSW landfills or in ash monofills. For example, Hennepin County, Minnesota, estimates the cost of disposing MSW ash as a hazardous waste to be $150 to $200 per ton. This figure is three to four times the $50 per ton which the county pays for ash disposal in a MSW landfill or monofill. Moreover, the cost is approximately six to seven times the national average for tipping fees at MSW landfills, which is $26.56 per ton.[13] Furthermore, if all the MSW ash currently produced is diverted to hazardous waste landfills, hazardous waste landfill charges will likely increase significantly due to the added demand for space. Thus, the nation's limited hazardous waste landfill capacity would be taxed substantially and shortages would result.

By increasing the cost of ash disposal so dramatically, the Seventh Circuit's ruling below will create a significant economic disincentive to resource recovery. For instance, the City of Akron, Ohio, estimates the following: the cost of landfilling one ton of MSW is $50; the cost of incincerating one ton of MSW and landfilling the ash in a MSW landfill is $57; and the cost of incinerating one ton of MSW and disposing of the ash in a hazardous waste landfill is $92. Thus, for Akron, it would cost almost twice as much to burn a ton of MSW and take the residue to a hazardous waste landfill than to simply dispose of the untreated MSW in a sanitary landfill. Similarly, Montgomery County, Ohio, estimates that incinerating MSW and disposing of the ash as a hazardous waste would be approximately three times as costly as disposing uncombusted MSW in a MSW landfill in the first place.

Likewise, New York City, which incinerates over 1 million tons of MSW annually, estimates that its cost per ton would increase from approximately $100 to over $300

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[13] National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991).

if the ash is designated as hazardous. This would increase New York's MSW disposal costs by over $200 million per year. By way of comparison, the cost of diverting the MSW waste stream directly to a MSW landfill without any incineration is only $30 per ton.[14] For Marion County, Oregon, landfilling MSW ash as a hazardous waste would almost double the cost of MSW disposal, raising it from the current cost of $46.95 per ton to $80.10 per ton. This can be compared with costs of $36 per ton to send MSW directly to a landfill without incinerating it.

As the examples above show, requiring that MSW ash be treated as a hazardous waste will make the incineration process economically infeasible in many communities and may result in disposal of all the MSW generated by these communities in sanitary landfills. Consequently, MSW landfill capacity will begin to diminish at an even faster rate and tipping fees will increase accordingly. Thus, pure economics would force many cities and counties to choose landfilling of MSW over resource recovery, if the ash residue had to be handled as a hazardous waste.

As a result of the economic disincentives created by the Seventh Circuit's decision, resource recovery will cease to be a viable option for many communities. Moreover, facilities in the planning or construction stage may be canceled and the future viability of existing facilities will be jeopardized. The 57 plants currently in the planning or construction stages represent enormous development costs[15] to both local governments and private own-

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[14] This figure, however, is far below market rates because New York owns and operates its own landfill. Furthermore, the $30 per ton figure does not include the cost of new landfill construction to compensate for lost capacity.

[15] In 1985, the cost of construction of a resource recovery facility capable of processing 1000 tons of MSW per day was $80 million. Neal & Schubel, *supra* note 9, at 117.

ers throughout the country who have relied on the RCRA's statutory goal of encouraging resource recovery and the explicit exemption of MSW resource recovery facilities from Subtitle C regulation provided by Congress in Section 3001(i).[16] Importantly, the Seventh Circuit's decision also results in geographical inequities by making MSW management far more expensive for cities and counties in Illinois, Indiana, and Wisconsin than for local governments located in other circuits. To resolve this uncertainty and inequity, the Court should grant the petition for certiorari to determine a national rule which cities and counties can rely upon in making MSW planning decisions.

C. Requiring Treatment of MSW Ash as a Hazardous Waste Will Place Unnecessary Financial Burdens on Cities and Counties

The financial burden of providing sanitation and solid waste disposal services has been increasing substantially for local governments, as has the cost of providing other essential services. At the same time, the federal government has drastically decreased its role in providing financial support to local governments. For example, local governments received 9% of their revenues from the fed-

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[16] The jurisdictions with publicly owned resource recovery facilities in the advance planning or construction stages include: Lisbon, Connecticut; Delaware Solid Waste Authority plant, near Millsburg, Delaware; Lee County, Florida; Mid-Maine Waste AC, Auburn, Maine; Montgomery County, Maryland; Oakland County, Michigan; Dakota County, Minnesota; St. Louis, Missouri; Mercer County, New Jersey; Monmouth County, New Jersey; Morris County, New Jersey; Union County, New Jersey; Mecklenburg County, North Carolina; Montgomery County, Pennsylvania; Kingston, Rhode Island; Johnston, Rhode Island; and Nashville, Tennessee. *The 1991 Municipal Waste Combustion Guide*, Waste Age, Nov. 1991, at 27. Numerous other plants, planned and financed by private companies, will serve other local governments, which will pay tipping fees for MSW disposal at these facilities.

eral government in 1980, but only 4% in 1988.[17] Adjusted for inflation, the decline is even more notable.

A study conducted by the National League of Cities in the Spring of 1991 illustrates the financial plight of the cities. Almost 61% of the cities surveyed reported that 1991 general fund expenditures were expected to exceed revenues, and over 26% said that expenditures would exceed revenues by more than 5%.[18] The bankruptcy of the City of Bridgeport, Connecticut, is but one example of the desperate financial circumstances facing many cities.[19]

Further, 66.3% of the responding cities reported that the cost of solid waste disposal was one factor beyond their control contributing to fiscal difficulties.[20] Over 10% of cities reported that landfill, refuse, solid waste and recycling expenses comprise the single factor that most adversely affected city expenditures.[21]

The Seventh Circuit's ruling will significantly increase MSW management costs by compelling local governments to pay for disposal of MSW ash in expensive hazardous waste landfills or to pay, either directly or indirectly through higher tipping fees, for increased MSW landfill space. If obliged to spend more for solid waste disposal, local governments will be even more disadvantaged in furnishing other needed services to their constituents.

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[17] U.S. Department of Commerce, *Statistical Abstract of the United States 1991*, at 295.

[18] National League of Cities, *City Fiscal Conditions in 1991*, at iii (1991).

[19] *See* George Judson, *Anguished Plea from Bridgeport for Fiscal Relief*, N.Y. Times, June 8, 1991, at 1. It is interesting to note that Bridgeport invested substantially in a resource recovery facility which went on line in 1988.

[20] National League of Cities, *supra* note 18, at 31. Solid waste disposal costs ranked higher than changes in the amount of state aid to cities (59.2%) and employee pension costs (58.5%).

[21] *Id.* at 7.

Like solid waste disposal costs, necessary service costs have been rising faster than have revenues. For example, while city government revenues rose by 9.5% between 1988 and 1990, solid waste mangament costs rose by 12.5%.[22] Over the same period, health costs rose by 15.3%, police protection costs by 11.1%, corrections costs by 26.9%, and judicial and legal administration costs by 17.3%.[23]

II. THE SEVENTH CIRCUIT'S DECISION FRUSTRATES CONGRESS' GOAL OF ENCOURAGING RESOURCE RECOVERY

Congress consistently has sought to promote two objectives relating to the handling of MSW: (1) keeping the management of MSW separate and apart from RCRA's hazardous waste management regime, and (2) facilitating resource recovery as an option for managing MSW in order to save scarce landfill space and promote energy recovery. As described below, these two objectives have been articulated by Congress in its enactment of RCRA in 1976, as well as in subsequent amendments to RCRA in 1980 and 1984.

A. The Congressional Scheme Regulating MSW Resource Recovery Is Separate from the Regulation of Hazardous Wastes Under Subtitle C of RCRA

In enacting RCRA in 1976,[24] Congress unambiguously separated the handling of MSW from the scheme for managing hazardous wastes established under Subtitle C of RCRA. *See* S. Rep. No. 988, 94th Cong., 2d Sess. 15-16 (1976) (stating the hazardous waste permit program is "not a general regulatory program of municipal or

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[22] U.S. Department of Commerce, *City Government Finances 1989-90*, at 1 (summary).

[23] *Id.*

[24] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k).

private sanitary landfill operations. . . . [and] is not to be used . . . *to extend control over* general municipal wastes") (emphasis added).

Expressing concern over the increasing scarcity of land available to metropolitan areas due to landfilling of MSW, Congress further concluded that resource recovery facilities should be promoted as an alternative to landfilling and as an independent source of energy. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. *See also* Section 1002(b)(8) and (d) of RCRA, 42 U.S.C. § 6901(b)(8) and (d). To facilitate the development of MSW resource recovery, Congress authorized technical as well as research and development aid to localities developing resource recovery facilities under Subtitles B and D of RCRA. *See* Sections 2003 and 4008 of RCRA, 42 U.S.C. §§ 6913, 6948. Also, Congress authorized EPA to promulgate rules and guidelines to assist states in implementing resource recovery plans, and to specifically consider appropriate types of resource recovery facilities for a variety of state and municipal situations. *See* Section 4002(c)(10) of RCRA, 42 U.S.C. § 6942(c)(10).

Congress' intention to promote the incineration of MSW to produce energy as a primary means of resource recovery is reflected throughout the legislative history of RCRA's enactment. For example, House Report 1491 explains that Section 4003 of RCRA, 42 U.S.C. § 6943, allows state and local governments the flexibility needed to develop alternative disposal systems by "requir[ing] that the discarded materials be utilized by a resource recovery facility for the recovery of energy . . . or that such discarded materials be disposed of . . . by [an] environmentally sound method of disposal, *including incineration* that does not conflict with the Clean Air Act." H.R. Rep. No. 1491, at 78-79 (emphasis added).[25]

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[25] *See also* H.R. Rep. No. 1491, at 88-89, *reprinted in* 1976 U.S.C.C.A.N. 6324 (detailing the composition of the MSW stream, and comparing the energy yields from incineration of MSW and

Four years after the passage of RCRA, Congress reaffirmed its objective of promoting the development of resource recovery facilities by enacting Section 32 of the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (hereinafter "1980 RCRA Amendments"). Section 32 of the 1980 RCRA Amendments, codified at various parts of Subtitle D of RCRA, amended the statute in order to improve and augment federal programs for energy and resource recovery assistance to states and municipalities. Section 32 authorized the EPA to provide grants to states and municipalities in order to facilitate waste-to-energy feasibility and developmental planning, and to provide technical assistance in order to remove impediments to the development of energy recovery.

Thus, the 1976 and 1980 statutes demonstrate Congress' intent to regulate MSW separately from hazardous wastes. These statutes and their legislative history also show that a primary objective of Congress was to promote the development of resource recovery facilities, including facilities which recovered energy from the *incineration of* MSW.

B. The Household Waste Exclusion Expressly Exempts All Aspects of MSW Management from RCRA's Hazardous Waste Regulatory Program

Consistent with the resource recovery policies and MSW regulatory scheme embodied by Congress in RCRA, EPA promulgated the household waste exclusion rule in 1980. *See* 45 Fed. Reg. 33,084, 33,120 (May 19, 1980), and *see* App. A, *infra*. Responding in the regulation's pre-

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coal in terms of the British Thermal Unit value per pound each contain, as well as their respective ash content equivalents); 122 Cong. Rec. H1147, H1153 (Sept. 27, 1976) (statement of Rep. Myers) (RCRA represents a "major congressional commitment" to recapturing the discarding of "millions of tons of paper, valuable metals, glass, and other waste materials which could be reused *or burned* for their energy value.") (emphasis added).

amble to comments suggesting that portions of household wastes should be regulated as hazardous wastes because they might include solvents, insecticides, and paints purchased at grocery stores, EPA pointed to Congress' intent to exclude the entire household waste stream from regulation as a hazardous waste. Although EPA acknowledged that hazardous constituents may be included in household wastes, the agency nonetheless concluded that Congress' intent was best served by excluding the entire waste stream from Subtitle C regulations:

> The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded *in all phases of its management, residues remaining after treatment* (e.g., *incineration*, thermal treatment) are not subject to regulation as hazardous waste.

45 Fed. Reg. at 33,099 (emphasis added). Hence, as a category of waste household waste, including ash residue remaining after treatment, was explicitly exempted from regulation as a hazardous waste. The rationale for this exemption was not based on the *content* of household waste, but rather on the express congressional policy of exempting *the entire* household waste stream from the hazardous waste regulations regardless of whether it could be classified as a hazardous waste on account of the characteristics of its constituents. *See id.* at 33,097.

EPA knew when it promulgated the regulation that a small amount of hazardous waste would be included in the household waste stream. However, neither Congress nor EPA intended to omit any particular phase in the management of the MSW waste stream from the household waste exclusion. In particular, by describing incinerator ash as the residue left after "treatment" of the waste stream, and including the ash within the discussion of the waste stream's overall management, EPA unambig-

uously exempted the ash from regulation as a hazardous waste. Thus, EPA excluded the *entire* household waste stream "in all phases of its management" from RCRA's hazardous waste regulatory regime, regardless whether the treatment residue—ash—might meet the legal definition of "hazardous waste."

Discussing the hazardous waste regulatory scheme in the preamble to the regulation, EPA acknowledged that the system was imperfect.

> This system may not work perfectly for every waste however. *It may overregulate in some instances and underregulate in others.* This is an unavoidable consequence of attempting to develop a national hazardous waste management program which has to regulate thousands of wastes . . . .

Id. at 33,088-89 (emphasis added). Viewed in this context, the fact that MSW ash was not regulated as a hazardous waste is not surprising. EPA, in accordance with the policy choice made by Congress simply struck a balance in favor of underregulation in order to promote the important social values of providing local governments with flexibility in handling their MSW and of encouraging resource recovery.

When Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (hereinafter "1984 RCRA Amendments"), it took the unusual step of expressly adopting and clarifying EPA's interpretation of legislative intent by enacting the "Clarification of Household Waste Exclusion." [26] The provision codified in the statute the household waste exclusion as promulgated by EPA. It also clarified that the exclusion removed the entire household waste stream from the Subtitle C hazardous waste regulatory regime, and that it

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[26] *See* Section 223 of the 1984 RCRA Amendments, 98 Stat. 3252 (codified as amended at § 3001(i) of RCRA, 42 U.S.C. § 6921(i)).

applied to resource recovery facilities which burned and derived energy from MSW.

The intent behind the clarification is stated in the Senate report accompanying the Senate amendments to the original House bill, and agreed to by the conference committee.[27] Recognizing that it was important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation, the Senate report indicated new Section 3001(i) clarified Congress' original intent to include within the household waste exclusion all the activities of a resource recovery facility which recovered energy from the mass burning of household waste *and* non-hazardous waste from other sources, as long as the facility took precautions against accepting hazardous waste from commercial sources.

> *All waste management activities* of such a facility, including the *generation*, transportation, *treatment*, storage and *disposal* of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) are met. . . . If such [limitations] are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

This unambiguous statement by the Senate that all MSW waste management activities by a resource recovery facility are covered by the exclusion confirms that EPA correctly reflected Congress' intent when it promulgated the household waste exclusion rule. This Court has ruled that an administrative agency's interpretation of

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[27] *See* H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5677.

congressional intent is entitled to great weight, when Congress is aware of the agency's interpretation but fails to revise or repeal the interpretation in subsequent legislation. *See Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986); *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974); *Zuber v. Allen*, 396 U.S. 168, 192-3 (1964); *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U.S. 269, 273 (1933). Therefore, EPA's 1980 household waste exclusion rule, which expressly covered treatment residue—ash—was confirmed by the 1984 RCRA Amendments.[28]

By focusing on whether "management" and "generation" are coextensive terms, the Seventh Circuit missed what is really at issue in interpreting the household waste exclusion: the congressional intent *that this* particular waste stream *in all phases* of its management, which includes *treatment* by incineration *and disposal of* the ash residue resulting from such treatment, be excluded from the regulatory scheme under Subtitle C of RCRA. Instead of placing the statute within the context of the underlying regulatory and statutory policies, the Seventh Circuit seized upon the absence of the word "generation" from the language of Section 3001(i) to support

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[28] Both the Seventh Circuit below, 948 F.2d at 350, and the district court in *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. at 768-69, noted that since the 1984 RCRA Amendments, the executive branch has taken inconsistent positions on the meaning of the household waste exclusion, and therefore gave little or no deference to EPA's "see-sawing" post-1984 interpretations of the statute. EPA's latest approach to the problem has been to throw in the towel completely and seek legislative clarification of the exclusion. *See* Letter from Lee Thomas, Administrator, EPA, to Rep. James Florio (May 17, 1988); *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 33 (1989) (testimony of Sylvia Lowrance, Director EPA's Office of Solid Waste).

an interpretation which contradicted and defeated the purpose of the statute.

The Seventh Circuit's focus on the absence of the word "generation" in Section 3001(i) is misplaced. First, "generation" is expressly included within the scope of the exemption in the Senate report's discussion of Section 3001(i) which was agreed to by the conference committee. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Second, the absence of the word "generation" in Section 3001(i) is irrelevant to whether the exemption extends to MSW ash. In producing ash, a resource recovery facility is not "generating" a new waste. Rather, it is *treating* pre-existing municipal solid waste to produce what EPA properly described as a "treatment residue" in the preamble to the 1980 household waste exclusion rule. Because Section 3001(i) expressly includes "treatment" within the scope of the exemption, the handling of the ash as a treatment residue also falls within the exemption.[29]

The Seventh Circuit's interpretation strips the statute of meaning by making the exemption no longer useful for the purpose it was intended to promote. By creating an economic disincentive to resource recovery, the Court of Appeals decision will in effect *discourage* the building of new resource recovery facilities which incinerate MSW as a means of energy recovery, and dissuade local governments from using existing facilities. The decision undermines Congress' intent in enacting the exclusion clarification, as well as Congress' underlying objectives with respect to the handling of MSW throughout the history of the RCRA legislation.

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[29] *See* Section 1004(34) of RCRA, 42 U.S.C. § 6903(34), which defines the term "treatment" when used in connection with a hazardous waste, to mean "any method, technique or process . . . designed to change the physical, chemical, or biological character or composition" of the waste.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the petition should be granted.

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April 20, 1992

APPENDIX A

1. Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

> CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION. A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
>
> (1) such facility—
>
> (A) receives and burns only—
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources),
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

2. As originally promulgated, 45 Fed. Reg. 33,084, 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1)), the Household Waste Exclusion stated:

> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-

used. "Household waste" means any waste material (including garbage, trash, and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF CHICAGO, *et al.*,
Petitioner,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1328

THE CITY OF CHICAGO, *et al.*,
Petitioner,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF CITY OF AMES, IOWA, CITY OF COLUMBUS, OHIO, CITY OF HARRISBURG, PENNSYLVANIA, CITY OF INDIANAPOLIS, INDIANA, CITY OF TULSA, OKLAHOMA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE HAMPTON/NASA/USAF REFUSE-FIRED STEAM GENERATING FACILITY, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NORTHEAST SOLID WASTE COMMITTEE, RESOURCE AUTHORITY OF SUMNER COUNTY, TENNESSEE, SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, ST. CROIX COUNTY, WISCONSIN, AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF PETITIONER

This brief *amici curiae* is submitted in support of the City of Chicago's petition for a writ of certiorari seeking review of the court of appeals' decision in *Environmental Defense Fund, Inc., et al. v. The City of Chicago, et al.*, 948 F.2d 345 (7th Cir. 1991) (reproduced as Appendix 1a-17a to the petition). The court of appeals ruled that section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i) (1988), requires the ash residue from the operation of waste-to-energy, resource recovery facilities to be managed subject to the hazardous waste management standards of RCRA.[1] *Amici* submit that the court of appeals' decision contradicts the plain meaning and clear legislative intent of section 3001(i), poses a serious obstacle to sound management of the growing municipal solid waste stream in the United States, and requires review by this Court. The petitioner and respondents have each consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF *AMICI*

A crisis in solid waste management confronts our Nation. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-89-019 (February 1989) (cited below as the "*Agenda For Action*"). The rate at which we produce municipal solid waste continues to increase. As petitioner notes (Pet. at 2), in 1988 we produced 180 million tons of municipal solid waste and the U.S. Environmental Protection Agency ("EPA") projects 216 million tons by the year 2000. Primary responsibility for managing the growing solid waste stream is with local government

[1] The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (non-hazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k). A "resource recovery facility" produces energy (steam and electricity) from the combustion of MSW. *See* 42 U.S.C. § 6903(24).

or local government agencies and special authorities like many of the *amici* (or the local government interests that other *amici* represent). *See* 42 U.S.C. § 6901(a)(4).

It is important to emphasize that *amici* and their constituents must be concerned with all of the public health, environmental and economic aspects of managing the municipal waste stream. That is the context in which *amici* have focused on the development of resource recovery facilities as a very important tool for addressing solid waste management. *Amici* are cities, counties, local government agencies, and organizations concerned with municipal solid waste management. In some instances, *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Ames, Iowa; Columbus, Ohio; Harrisburg, Pennsylvania; Indianapolis, Indiana; Montgomery County, Ohio; Nashville, Tennessee; St. Croix County, Wisconsin; and Tulsa, Oklahoma). Other *amici* are local government agencies and special authorities (Davis County Solid Waste Management and Energy Recovery Special Service District (Utah); Greater Detroit Resource Recovery Authority (Michigan); Joint Board of Oversight, Hampton, Virginia/NASA/USAF Refuse-Fired Steam Generating Facility; Resource Authority of Sumner County, Tennessee; Southeastern Public Service Authority of Virginia; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (North Andover, Massachusetts)).[2] Another of the *amici*, the

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[2] The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southhampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing

Minnesota Resource Recovery Association, is a partnership consisting primarily of public entities working with the private sector in the development, ownership and operation of resource recovery facilities and other types of waste management facilities.[3] *Amicus* National Institute of Municipal Law Officers (NIMLO) is a nonpartisan organization representing more than 1,400 local governments and their attorneys. NIMLO is dedicated to sound resolution of nationally-important legal issues affecting municipalities, including waste management issues.

Resource recovery facilities are key components of the integrated waste management systems that many local governments throughout the United States are pursuing (integrated waste management means the complimentary use of several waste management methods—source reduction, recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economic manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as nonhazardous waste consistent with the

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governmental functions concerning waste management on behalf of the following twenty-three Massachusetts communities: Acton, Andover, Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wenham, Westford, West Newbury, Wilmington and Winchester.

[3] The Minnesota Resource Recovery Association's waste-to-energy facilities serve the following Minnesota counties: Anoka, Benton, Carlton, Carver, Clay, Dodge, Douglas, Grant, Hennepin, Hubbard, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin. The other members of the Association are: Winona and Dakota Counties, City of Fergus Falls, City of Red Wing, Northern States Power Company, United Power Association, Quadrant Company, Richards Asphalt, and ABB Resource Recovery Systems.

requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949a, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by the hazardous waste management standards of RCRA Subtitle C, 42 U.S.C. §§ 6921-39b, are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 137 resource recovery facilities now operating in the United States produce approximately 7.9 million tons of ash annually. *See* Jonathan V.L. Kiser & B. Kent Burton, *Waste-to-Energy in the United States, A Status Update*, Proceedings of the Utah State University Waste Management Conference 1-2, 7 (March 4-5, 1992) (cited below as "*Kiser & Burton*") (calculated based on data presented). Aside from the financial implications of managing this ash as hazardous waste, *amici* and their constituents face serious enforcement consequences as well—the prospect of lawsuits based on the Seventh Circuit's decision is of great concern to resource recovery facilities.[4] Finally, the decison below undermines carefully designed solid waste management plans for *amici* and many other communities throughout the United States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

REASONS FOR GRANTING THE WRIT

As the EPA has noted, there is a "serious and growing solid waste problem in many American cities. As a nation, we are generating more garbage all of the time, and we don't know what to do with it." *Agenda for Ac-*

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[4] The only exception is the Second Circuit, where the governing interpretation of section 3001(i) directly conflicts with the decision below. *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 493 (1991).

tion at 8. The volume of municipal solid waste in the United States continues to increase steadily, both in overall tonnage and per capita. Indeed, for the period 1988 to the year 2000 per capita volume is expected to increase by 10 percent. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, at ES-3, EPA/530-SW-90-042 (June 1990) (cited below as "*1990 Update*"). Traditionally, landfilling of MSW had been the primary management alternative, taking 80 percent or more of the municipal waste stream. *Agenda for Action* at 22-23. Combustion of MSW, which previously had somewhat wider use, declined into the 1970's and early 1980's as old incinerators were closed down due to increasingly stringent air pollution control standards. *1990 Update* at 54. Although Congress had begun to recognize the dimensions of the problem, a landfill crisis followed in the 1980's. *Id.* at 56.[5]

How to respond to these developments—selecting the best management alternatives—poses very important policy questions for all levels of government. A principal response has been the adoption of state and federal laws and policies encouraging development of resource recovery facilities that employ state-of-the-art air pollution control systems. Waste combustion with energy recovery is favored over landfilling, the principal alternative. *See 1990 Update* at 4. Although more costly in the short run, resource recovery is environmentally superior to landfilling. *See* 54 Fed. Reg. 52209, 52245, column 3 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in an MWC [municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste manage-

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[5] Congress warned in 1976 that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste stream, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. §§ 6901(b)(1) and (8).

ment option (see RCRA section 1002(b)(8)), but it is sound policy to recover the energy value of the combustibles rather than burying them" [citations omitted]).[6] In adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized that the use of technology to produce usable energy from waste needed to be encouraged, both to reduce our reliance on diminishing fossil fuel resources, as well as to reduce the burden of disposing of increasing volumes of MSW. 42 U.S.C. § 6941a. Following Congress' lead, a number of states adopted laws and policies that provided further encouragement to resource recovery facilities. The result has been a significant increase since 1985 in the development of these facilities by local government. But as a consequence of the court of appeals' decision, local government now confronts the specter of RCRA enforcement actions like the instant case and the overturning of carefully made solid waste management decisions by *amici* and many other communities who are faced with possible shutdown of resource recovery facilities and cancellation of new facilities.

1. Turning first to the immediate enforcement impact of the decision below, there are approximately 137 resource recovery facilities operating in the United States today (and another 75 under construction or in various stages of planning). *See Kiser & Burton* at 1-2. These facilities are located throughout the United States, and they manage ash residue subject to RCRA Subtitle D

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[6] *See also* Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment").

and related state laws as nonhazardous waste; at no time have these facilities managed ash as hazardous waste pursuant to RCRA Subtitle C. Although the impact of the decision below is most imminent in the Seventh Circuit (if the Court does not grant the petition, then such facilities would have no choice but to begin managing resource recovery facility ash subject to Subtitle C requirements), the decision below will, absent review by this Court, create serious uncertainty for essentially all resource recovery facilities.

The court of appeals' decision poses a Hobson's choice for resource recovery facilities. One option would be to change their method of operation and begin managing ash residue subject to RCRA Subtitle C. That change in operations would carry a very steep price, however. As explained in more detail below (pp. 11-12), the cost of managing ash residue as hazardous waste could easily cause current waste management costs to more than double, far outstripping the financial resources of the affected communities, and would also require dedicating limited hazardous waste landfill capacity to disposal of resource recovery facility ash.

If the instant petition is not granted, it is expected that respondents (or other organizations with similar interests) will file additional suits identical to the suit filed below in the Northern District of Illinois (and the related suit filed in the Southern District of New York in the *Wheelabrator* case, *see supra* note 4). Both suits were filed pursuant to the citizen suit provisions of section 7002 of RCRA, 42 U.S.C. § 6972. A citizen suit may be filed under that statute against any person "who is alleged to be in violation" of any provision of RCRA. *Id.* at § 6972(a). In these suits, the district courts are authorized to impose injunctive relief and civil penalties of up to $25,000 per day of violation. *Id.; see also* 42 U.S.C. § 6928(g). The statute of limitations that generally applies in similar civil penalty actions is five years.

See 28 U.S.C. § 2462; *see also Public Interest Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73-76 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (applying 28 U.S.C. § 2462 to citizen suits under section 505 of the Federal Water Pollution Control Act). A resource recovery facility produces ash every day that it operates, and it is apparent that the failure to follow the Seventh Circuit's view of section 3001(i) of RCRA puts such facilities at considerable enforcement risk. In short, granting the petition here will eliminate the troubling uncertainty that results from the Circuits' conflicting interpretations of section 3001(i).

2. Aside from these enforcement implications, the decision below will seriously undermine carefully designed solid waste management plans for many communities and threaten the financial viability of most, if not all, resource recovery facilities due to the cost of managing resource recovery facility ash as hazardous waste. The economic burden that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities.

As noted earlier, federal and state laws and policies adopted in response to the growing solid waste dilemma vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. In that connection, section 32(a) of the Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. § 6941a, recognizes that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste". The laws of a number of states are very similar. For example, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage

resource recovery and establishment of waste-to-energy facilities", as well as "potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities", with the "goal of reducing land disposal to unusable residuals by the year 2005". Section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ." Similarly, section 102(2) of the Pennsylvania Solid Waste Management Act, Pa. Stat. Ann. title 35, § 6018.102(2), encourages the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy".[7]

Implemented through careful solid waste management planning by local government, these policies have resulted in a significant increase in resource recovery facilities. Between 1985 and 1988 annual combustion of MSW with energy recovery increased from 7.6 to 24.5 million tons.

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[7] *See also* Va. Code Ann. § 10.1-1402 (Virginia Waste Management Board directed to promote the development of resource recovery systems); Ohio Rev. Code Ann. § 3734.40 (offsite waste management, including municipal waste combustion, is a "critical component[] of the economic structure of this state, and when properly controlled and regulated, makes substantial contributions to the general welfare, health and prosperity of the state and its inhabitants . . ."); Wis. Stat. § 159.05(4)(s) (combustion of MSW with energy recovery as a substitute for the use of nonrenewable fuels is in the public interest and should be encouraged if implemented by a state-approved program that protects health and the environment). States have also adopted policies to implement these statutory directives. For example, the goal of the *Michigan Solid Waste Policy, supra* note 6, is to manage 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reduce the amount of MSW going to landfills to 10 percent by the year 2005.

1990 Update at 55, Table 26; *see also id.* at 53. The 1988 level is projected to double by the year 2000 and reach 55 million tons. *Id.* at 73. Indeed, the Bush Administration projects a seven-fold increase between 1991 and 2010 in the amount of electric energy generated in the United States from MSW combustion. *See* U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' majority decision is a severe setback—and a classic "Catch-22"—for *amici* and scores of communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facility ownership and operation was not only environmentally superior, but also generally more costly in the short run than landfilling MSW.[8] If the ash residue from a resource recovery facility must now be managed subject to hazardous waste standards, the cost of resource recovery facility operations will increase dramatically. In this connection Chicago's petition notes that a conservative 1990 average cost to dispose of ash at a hazardous waste landfill would be $210 per ton. Pet. at 9 n.3 (citing ICF, Inc., *1990 Survey of Selected Firms in the Commercial Hazardous Waste Management Industry, Draft Report* (prepared for U.S. EPA, Office of Policy Analysis) (Sept. 17, 1991)). That average is consistent with disposal cost estimates that a number of the *amici* have developed internally (*amici*'s estimates range from $162 to more

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[8] The processing or "tipping" fees charged by modern resource recovery facilities are generally $40 to $100 per ton of municipal solid waste processed. *See* Jonathan V.L. Kiser, "A Comprehensive Report on the Status of Municipal Waste Combustion", *Waste Age* 109, 156 (November 1990). In contrast, the 1990 average landfill tipping fee in the United States was $26.56 per ton. *See* National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991).

than $400 per ton, including transportation).[9] At $210 per ton for ash disposal, the tipping fees charged by individual resource recovery facilities would easily double their current levels.[10] In short, the court of appeals' decision portends a dramatic increase in cost far beyond any level of cost anticipated by the many local governments that chose resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing facilities to shut down, and future development of new facilities would essentially be eliminated, contrary to RCRA's policy of encouraging resource recovery.[11]

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[9] At present there are only 21 hazardous waste landfills in the United States. *See* Jeffrey D. Smith, "Hazardous Waste Landfill Facility Information", *Environmental Information Digest* 24 (March 1992) (cited below as "EI Digest"). As a result, long distance transportation would frequently be required.

[10] For example, one of the *amici*, the York County Solid Waste and Refuse Authority, currently charges a tipping fee of $53.75 per ton of MSW, of which approximately $4.50 represents ash disposal costs in a nonhazardous waste landfill (York County currently pays approximately $15.00 per ton for ash disposal; based on a 70 percent weight reduction ratio when a ton of MSW is combusted, the $15.00 figure represents a $4.50 portion of the tipping fee for each ton of MSW received for processing). Using the conservatively estimated $210 per ton cost for disposal of resource recovery facility ash as hazardous waste, and adding long distance transportation costs, tipping fees would more than double.

[11] It is likely to be more economic for a community that is presently served by a resource recovery facility to shut down the facility, landfill the community's MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facility rather than operate the facility and have to absorb the cost to manage ash residue as hazardous waste. Moreover, the potential liability associated with navigating the complex scheme of federal hazardous waste regulations would further discourage resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

One additional point should be noted in this regard. Hazardous waste landfill disposal capacity is limited. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.[12] Only one hazardous waste landfill has been permitted since 1987 (in fact, only one hazardous waste landfill has been permitted during the past twelve years).[13] Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon. On the other hand, resource recovery facilities currently in operation produce approximately 7.9 million tons of ash each year. *See supra*, p. 5. If as a result of the decision below that ash is required to be disposed in hazardous waste landfills, it can readily be seen that all of the United States' current hazardous waste landfill capacity would be consumed within a very short period.

3. Finally, the court of appeals' decision is wrong as a matter of statutory construction. This Court has often stated that in determining the meaning of a statute, courts should look to the particular statutory language at issue within the context of the statute as a whole, including its object and policy. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990). The Seventh Circuit's narrow reliance on the absence of the word "generation" in section 3001(i) to conclude that resource recovery facility ash is subject to hazardous waste regulation ignores that fundamental tenet of statutory construction.

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[12] *See Regulation of Municipal Solid Waste Incinerators: Hearing on H.R. 2162 Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

[13] This is the Last Chance, Colorado hazardous waste landfill, which began operation in July, 1991. *See EI Digest, supra* note 10, at 24. Last Chance has 2.5 million tons of capacity. *Id.* at 26.

When Congress adopted section 3001(i) as part of the 1984 amendments to RCRA the regulatory context in which Congress addressed resource recovery facility ash was one that already exempted such ash from regulation as a hazardous waste. More specifically, EPA's 1980 "household waste exclusion" unambiguously excluded from hazardous waste regulation the ash residue that remains following combustion of household waste. *City of Chicago*, 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). Adopted as part of the EPA's regulations governing RCRA's hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976) (RCRA's hazardous waste management program "is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances")). EPA concluded that "[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to "all phases of [the] management" of household waste, including ash residue after treatment, such as incineration.

Thus, when Congress enacted section 3001(i) in 1984, the regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation. Congress is presumed to know an agency's interpretation of a law pertinent to legislation Congress is enacting, *Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1990), and this is the con-

text in which Congress was operating when it added section 3001(i)—the "Clarification of Household Waste Exclusion"—in 1984. The statute provides in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are not received at or burned at the facility. 42 U.S.C. § 6921(i). In other words, the household waste exclusion already encompassed "all phases" of the "management" of household waste, including "treatment" (*e.g.*, incineration), and section 3001(i)'s use of the term "otherwise managing" continued the Subtitle C exemption for ash residue. Indeed, the plain language of the section 3001(i) "clarification" does nothing to terminate the prior exclusion for ash from resource recovery facilities that burn household and nonhazardous commercial or industrial waste. Instead, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns household waste and nonhazardous waste from sources other than households (*e.g.*, commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or burn hazardous waste. S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). This unique mechanism is not available to any other type of waste management facility.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). Nothing in the legislative history even remotely suggests that Congress, by not including the word "generation", intended the result reached by the court of appeals. To the contrary, since 1976 Congress has on numerous occasions expressed its

intent to promote resource recovery facilities. *See, e.g.*, 42 U.S.C. § 6902(a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). In fact, the Senate Report accompanying section 3001(i) explicitly states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284 at 61.

Key legislative history confirms that section 3001(i) excludes resource recovery facility ash from hazardous waste regulation. The Senate Report accompanying the legislation states that the section 3001(i) exclusion applies to "[a]ll waste *management* activities including the *generation*, transportation, treatment, storage and disposal of waste." S. Rep. No. 284 at 61 (emphasis added). Put another way, Congress unequivocally intended to exclude "all waste management" activities associated with resource recovery facilities. That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes generation of hazardous waste, are excluded. When examined in this overall legislative context, the court of appeals' reliance on the absence of the word "generation" in section 3001(i) is plainly incorrect.[14]

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[14] The Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change, stating only that "the Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984).

The Seventh Circuit's interpretation of section 3001(i) also renders the statute essentially meaningless. *See, e.g., Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987) (it is presumed that Congress does not pass meaningless legislation). As explained by the district court in *Wheelabrator, supra* note 4, if resource recovery facility ash is not excluded from hazardous waste regulation, "it is difficult to understand what, if any, benefit resource re-

Finally, the Seventh Circuit's decision may also result from a fundamental misconception regarding the nature of landfilled municipal solid waste and resource recovery facility ash. The court of appeals said "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, landfilling of MSW poses greater environmental concern than landfill disposal of ash, a fact that is reflected in governmental policies encouraging the development of resource recovery facilities. *See supra* note 6.[15]

In sum, the Seventh Circuit's conclusion that by a sleight of hand Congress significantly limited the scope of the household waste exclusion is wrong and entirely

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covery facilities derive from the exemption." 725 F. Supp. at 763 n.12. Simply put, if a resource recovery facility receives only non-hazardous waste, it never will be subject to hazardous waste regulation as a treatment, storage or disposal facility and no exemption would be needed. The only meaningful interpretation of section 3001(i)—that MSW ash is exempt from hazardous waste regulation—was correctly reached by the Second Circuit in *Wheelabrator*.

[15] *See generally* State of Florida, Division of Administrative Hearings, *Recommended Order* at 6, *Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility* (No. 90-3942EPP) (December 9, 1991) (the leachate from resource recovery facility ash is far less of an environmental concern than the leachate from MSW). It should also be noted that the Seventh Circuit's above-quoted statement appears to have been made without considering the record in this case, which shows that ash from Chicago's Northwest Waste-to-Energy Facility is disposed in Michigan at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. Pet. at 6-7. Those disposal standards are generally required by Michigan law, Mich. Comp. Laws § 299.432a, and typical of the laws of a number of other states. *See, e.g.*, Mass. Regs. Code title 310, § 19.119.

inconsistent with the language and purpose of RCRA section 3001(i). *See Green v. Block Laundry Machine Co.*, 490 U.S. 504, 521 (1989) (party contending that legislative action changed governing law has the burden of showing that the legislature intended such a change). That interpretation of section 3001(i) jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to clearly expressed federal policy.

To resolve the conflict in the Circuits and clarify this important issue of federal environmental law, this Court should grant the City of Chicago's petition for a writ of certiorari and reverse the judgment of the court of appeals.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CITY OF CHICAGO, et al.,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE CITY OF SPOKANE, WASHINGTON; SPOKANE COUNTY, WASHINGTON; SKAGIT COUNTY, WASHINGTON; CITY OF TACOMA, WASHINGTON; MARION COUNTY, OREGON; RECOMP OF WASHINGTON; AND REGIONAL DISPOSAL COMPANY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The City and County of Spokane, Washington; the City of Tacoma, Washington; Skagit County, Washington; Marion County, Oregon; Regional Disposal Company; and Recomp of Washington respectfully submit this brief as amici curiae in support of the petition of the City of Chicago and Mayor Richard M. Daley for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.[1]

INTERESTS OF AMICI

The United States faces a waste disposal crisis. In contrast to landfills, space for which is fast disappearing, incineration recovers energy from and reduces the volume of municipal trash. These benefits, among others, make resource recovery a key weapon in the war on waste. The decision of the Court of Appeals, however, threatens to foreclose resource recovery and to punish every private and public entity that accepted Congress's invitation to exploit its benefits.

For the City and County of Spokane, Washington, resource recovery was a response not only to a waste disposal crisis, but also to a drinking water crisis. The citizens of the City of Spokane and Spokane County (collectively "Spokane") are blessed with a priceless resource: the Spokane Valley-Rathdrum Prairie Aquifer. The aquifer is the federally designated sole source of drinking water for over 500,000 people. 43 Fed. Reg. 5566 (Feb. 9, 1978). Yet it is also a fragile resource, subject to pollution by landfills. Landfills above the aquifer have been a concern for many years.

Contamination of the aquifer from solid waste landfills was first noted in 1979 when the Spokane County Engineer's office issued its Water Quality Management Plan to Preserve the Quality of the Spokane-Rathdrum Aquifer under Section 208 of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1288 (West Supp. 1991). The Water Quality Management Plan

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

recommended that resource recovery, recycling, and innovative disposal methods be considered as alternatives to landfills. In 1984 Spokane's Northside Landfill was placed on the National Priorities List (NPL) of waste cleanup sites, commonly referred to as "Superfund sites." 49 Fed. Reg. 40,320 (October 15, 1984). Spokane's landfills at Mica, Greenacres and Colbert were also added to the NPL. 51 Fed. Reg. 21,054 (June 10, 1986).[2] The Mica, Greenacres and Colbert landfills are now closed, and all but a few acres of the Northside Landfill are closed as well.

In response to this crisis involving both its drinking water supply and its waste disposal capacity, Spokane began a regional public planning process. Spokane's goal was to consider local needs and policies and develop a balanced waste management program in accordance with the Washington Solid Waste Management Act ("SWMA"), Wash. Rev. Code ch. 70.95 (1989).

The first step in the planning process was to consider alternatives to solid wastes landfills. In 1981 Spokane began analyzing resource recovery and recycling. Three years later it adopted the 1984 Spokane County Comprehensive Solid Waste Management Plan Update ("1984 Plan"). The 1984 Plan includes specific elements for recycling, waste reduction and resource recovery; garbage landfills are only a last resort for Spokane. The Washington Department of Ecology ("Ecology") approved the 1984 Plan, and the Washington Supreme Court held it was consistent with the SWMA. Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 785 P.2d 447 (1990).

To mitigate the effects of existing landfills as rapidly as possible, Spokane aggressively implemented the recycling and resource recovery elements of the 1984 Plan. Recycling programs increased the recycling rate in

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[2] Sites are added to the NPL only if the Environmental Protection Agency finds that they present a significant risk to public health or the environment compared to other sites in the nation. 40 CFR § 300.66 (1991).

Spokane County from 5% in 1984 to 31% in 1991.[3] To manage the rest of the waste stream, Spokane issued an environmental impact statement and selected a site for a "waste-to-energy facility" ("WTE") in 1986. In 1987 Spokane signed a vendor contract to build and operate the WTE, a power sales contract for the electricity that the WTE generates, and a lease for the WTE site. In 1989 Spokane issued $103 million in bonds and accepted a $60 million grant from Ecology to design and build the WTE and recycling programs. In 1990 Spokane signed a long-term contract for ash disposal away from Spokane's aquifer at amicus Regional Disposal Company's new state-of-the-art landfill in Klickitat County, Washington.

Amici Skagit County, Marion County and Tacoma all faced solid waste disposal challenges similar to Spokane's. They planned long-term, integrated strategies and opted for resource recovery as cost-effective and in the best interests of their local communities. Whatcom County, Washington, under the planning requirements of SWMA, elected to use private incineration and ash landfill facilities located in Whatcom County but owned and operated by amicus Recomp of Washington ("Recomp"). Amicus Regional Disposal owns and operates an ash landfill in Klickitat County, Washington, that serves Spokane and could become an ash disposal facility for any new or existing resource recovery facilities in the Pacific Northwest.

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[3] Spokane's long-range goal is to recycle 50% by 1995, in accordance with the goal set by the Washington Legislature. Wash. Rev. Code § 70.95.010(9) (1989). See also Spokane County Comprehensive Solid Waste Management Plan Update, pp. 75 and 100 - 101 (March 1991).

SUMMARY OF ARGUMENT[4]

Congress provided a comprehensive national framework for waste management in the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 - 6992k ("RCRA"). RCRA establishes minimum federal requirements that are implemented at the state and local level. State and local government may supplement RCRA's minimum requirements with more stringent standards.

At the heart of RCRA is a distinction between wastes that are "hazardous" and wastes that are not. See 42 U.S.C.A. § 6921 (West Supp. 1991). "Hazardous" wastes are a small, distinct subset of "solid" wastes. Hazardous wastes are subject to very stringent minimum standards under Subtitle C of RCRA. See 42 U.S.C.A. §§ 6921 - 6939b (West Supp. 1991). Subtitle C standards detail all phases of hazardous waste management, from the type-size on 55-gallon drum labels to the design standards for large regional landfills. Solid wastes are subject to an equally comprehensive but less stringent set of minimum standards under Subtitle D of RCRA. See 42 U.S.C.A. §§ 6941 - 6949a (West Supp. 1991).

Congress's decision to regulate hazardous and solid wastes separately rests on the sound principle that hazardous wastes pose the greatest risk to public health and should be regulated more stringently than other wastes. Congress also recognized, however, that applying Subtitle C standards broadly could discourage beneficial activities. Furthermore, effective implementation of Subtitle C requires that regulations be focused on the relatively small number of industries that generate the largest amounts of hazardous waste. Thus, Congress

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[4] Amici curiae agree with petitioners' arguments that the Court should grant review because the Second and Seventh Circuits have issued conflicting rulings, because the Seventh Circuit's decision contravenes RCRA's language and Congress's intent, and because the question presented calls for judicial resolution. The thrust of this brief is different: It calls attention to the uncertainty created in the Pacific Northwest by the Seventh Circuit's decision and shows how that decision undercuts fundamental statutory policies in RCRA.

authorized exclusions to its definition of hazardous waste and entrusted the states with the primary responsibility for regulating the remaining waste stream.

The Court of Appeals' decision in this case ignores these key policy considerations. The Seventh Circuit's interpretation of RCRA would subject local solid waste management to stringent Subtitle C standards. If adopted in the Ninth Circuit, the court's interpretation would require Pacific Northwest cities and counties implementing resource recovery and recycling programs to amend existing waste management plans and to even consider abandoning existing public and private waste management facilities. Cities and counties would be required in the 1990s to start yet another decade-long effort to address the solid waste crisis, but with less time and even fewer options than were available in the 1980s.

The Court of Appeals' decision also threatens to disrupt existing contractual arrangements between the public and private sectors. Long-term contracts have been signed based on predictable, long-term operating costs. Hundreds of millions of dollars worth of municipal bonds have been issued and repayment terms negotiated based upon predictable, long-term ash disposal fees. An immediate and unexpected 300% increase in landfill costs could jeopardize the ability of government to repay these bonds. This in turn could ruin municipal bond ratings and jeopardize financing for roads, buildings, bridges, sewers, waste water treatment plants, landfill closures and public transit.

Such costs might be tolerable if they made possible some significant public benefit. Imposing Subtitle C standards on ash, however, will not provide any additional protection for the public. In Oregon and Washington, ash and other processed solid wastes are managed under specifically tailored standards that are at least as stringent as EPA's newest Subtitle D standards.[5] In a landfill environment, ash is less troublesome than unprocessed

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[5] In October 1991 EPA substantially upgraded its Solid Waste Disposal Facility Criteria. 56 Fed. Reg. 50978 (October 9, 1991) (to be codified at 40 CFR Parts 257 and 258).

garbage. Making ash management subject to Subtitle C will not protect the public or help solve the nation's solid waste crisis, but instead will merely impose Respondents' waste management agenda on state and local government.

ARGUMENT

1. Ash Poses Less Risk to the Public Than Municipal Solid Waste ("MSW").

Congress provides different levels of regulation under RCRA, depending on the degree of risk to the public from improper management of different kinds of waste. Hazardous waste can "cause or significantly contribute to an increase in mortality or an increase in serious illness" and can "pose a substantial present or potential hazard to human health or the environment." 42 U.S.C.A. § 6903(5) (West 1983). Solid waste, on the other hand, is "any garbage, refuse, sludge . . . and any other discarded material," regardless of the threat posed to the public or environment. 42 U.S.C.A. § 6903(27) (West 1983).

Both municipal solid waste[6] and ash from its incineration have been tested to determine potential public health concerns. Extensive testing of leachate[7] from ash and MSW has been documented by public agencies and

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[6] "Municipal solid waste", or "MSW," refers to waste from households, businesses and institutions that is excluded from the definition of "hazardous" in RCRA and EPA regulations. See footnote 10, infra.

[7] "Leachate" refers to liquids such as water that pass through a waste material and collect contamination from the waste. Leachate from a landfill can migrate and pollute ground water unless collected and properly treated and disposed. A system of landfill liners and collection pipes serves this purpose. See, e.g., EPA Solid Waste Disposal Facility Criteria: Final Rule, 56 Fed. Reg. 50978 (Oct. 9, 1991); Minimum Functional Standards for Solid Waste Handling Facilities, Wash. Admin. Code ch. 173-304 § 460 (1990); and Special Incinerator Ash Management Standards, Wash. Admin. Code ch. 173-306 § 440 (1990).

private companies for both research and compliance purposes.[8] The U.S. Environmental Protection Agency's "Toxic Characteristic Leaching Procedure" ("TCLP"), which is used to determine if a solid waste is "hazardous", mimics leachate generation in a landfill. 40 CFR § 261.24 (1991). TCLP tests on ash and ash landfill leachate have been compared to the results of tests on MSW landfill leachate.[9] Consistently, leachate from ash is less contaminated than the leachate from MSW landfills.

These tests clearly demonstrate that, in a landfill environment, ash presents less risk of ground water pollution than MSW. It is undisputed that MSW is not regulated as a "hazardous" waste under Subtitle C of RCRA.[10] Congress concluded that MSW can be safely regulated under Subtitle D as a solid waste. The Court of Appeals' decision imposing Subtitle C standards on ash management is perverse. Congress did not intend Subtitle

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[8] EPA, Characterization of Municipal Combustion Ash, Ash Extracts and Leachates (March 1990) (EPA/530-SW-90-29A); NUS Corp., Final Municipal Waste Combustion Ash and Leachate Characterization, Woodburn, Oregon (1989); Ujihara, Managing Ash From Municipal Waste Incineration (Nov. 1989); Clapp, Municipal Solid Waste Composition and the Behavior of Metals in Incinerator Ashes (Feb. 1988); McGinley and Kmet, Formation, Characterization, Treatment and Disposal of Leachate from MSW Landfills (August 1987) (Wisconsin Department of Natural Resources).

[9] NUS Corp., Characterization of MWC Ashes and Leachates from MSW Landfills, Monofills and Co-Disposal Sites (1987) (EPA/530-SW-87-028F).

[10] Congress clearly intended that "general municipal wastes" not be regulated as hazardous. S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). See also 42 U.S.C.A. § 6941 (West Supp. 1991). "Household" waste, regardless of its content or quantity, has been excluded from Subtitle C since RCRA's inception. 43 Fed. Reg. 58969 (Dec. 18, 1978)(promulgating 40 CFR § 261.4(b)(1) (1991)). In 1984 Congress provided a "clarification of household hazardous waste exclusion" in the section of RCRA that is the focus of this litigation; i.e., 42 U.S.C.A. § 6921(i) (West Supp. 1991) (herein "RCRA Section 3001(i)"). Small quantities of waste from businesses and institutions, regardless of content, have also been excluded from Subtitle C since RCRA's inception. 43 FR 58969 (Dec. 18, 1978); 40 CFR § 261.5 (1991). Together, these exclusions allow local government to manage MSW outside the confines of Subtitle C.

C to apply to waste that poses less risk to public health than MSW.

2. Applying Subtitle C Standards to Ash Discourages Beneficial Waste Management Options.

The Court of Appeals' interpretation of RCRA threatens the viability of both of the key alternatives to MSW landfills: resource recovery and material separation. RCRA, however, reflects a national policy that encourages resource recovery and recycling. Congress found:

> [M]illions of tons of recoverable material which could be used are needlessly buried each year [, and] methods are available to separate usable materials from solid waste.
>
> * * *
>
> [S]olid waste represents a potential source of solid fuel, oil or gas that can be converted into energy [, and] technology exists to produce usable energy from solid waste.

42 U.S.C.A. § 6901(c) and (d) (West 1983). See also id. § 6941(a)(1) - (3).

Compliance with Subtitle C would dramatically impact existing resource recovery and ash disposal facilities. For example, Spokane transports ash for off-site disposal at a privately owned landfill and pays a "tipping fee" to amicus Regional Disposal Company, the landfill owner. The tipping fee is based in part on landfill operating costs, which are in turn influenced by the extent of landfill regulations. Amici Skagit County, Marion County and Tacoma dispose of ash at publicly owned landfills. These communities do not pay tipping fees, but instead directly finance the costs of operating ash landfills. Amicus Recomp owns and operates resource recovery and ash disposal facilities in Whatcom County, Washington, and charges a disposal fee based on the cost of operating both facilities. Typically, ash disposal costs represent 20 - 30% of the cost of operating a resource recovery facility.

The relative costs of operating Subtitle C and Subtitle D landfills are reflected in the tipping fees charged by these facilities. The tipping fee for off-site ash disposal in the Pacific Northwest is approximately $35 - 40 per ton. The operating cost for on-site ash disposal in the Northwest is approximately $25 - 30 per ton.[11] The cost of disposal at RCRA Subtitle C facilities in the Pacific Northwest, on the other hand, is approximately $120 - 140 per ton.[12]

Thus, the Court of Appeals' decision would impose an immediate tipping fee increase on existing facilities of at least 300%.[13] Many resource recovery facilities would be forced to close. All of the existing ash landfills would be forced to close or bear the additional cost to upgrade to Subtitle C standards, if that were possible. Solid waste landfills would increase. This would further exacerbate an already short supply of landfill capacity and, in areas such as Spokane, accelerate the threat to drinking water from leaking solid waste landfills. This is hardly consistent with Congress's expressed policy to encourage energy recovery from solid waste and minimize solid waste landfills.

The Court of Appeals' decision could also adversely affect material separation (i.e., "recycling"). To justify its interpretation of RCRA, the Court of Appeals relied heavily

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[11] The difference between the cost per ton for on-site and off-site ash disposal is primarily due to the cost of transportation.

[12] In the Pacific Northwest, existing Subtitle C landfills are located in Montana, Utah, Idaho and Oregon. The cost estimate for disposal at these facilities does not include the cost of transportation.

[13] In 1987 EPA recognized the significant cost of disposing of ash as hazardous waste: "If the ash generated by a municipal waste combustion facility were to be managed as a hazardous waste, the cost of managing that ash would be expected to increase substantially." EPA, Municipal Waste Combustion Study: Report to Congress, p. 26 (June 1987) (EPA/530-SW-87-021).

upon the fact that incineration changes the physical and chemical nature of solid waste.[14]

> [T]he "garbage" that emerges from the incineration process -- ash -- is fundamentally different in its chemical and physical composition from the . . . rubbish that goes in. It does not follow that the generation of . . . a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare households and municipalities from a complicated regulatory system if they inadvertently handled hazardous waste.

Environmental Defense Fund, Inc. v. City of Chicago, 948 F.2d 345, 351 (7th Cir. 1991); Petition for Writ of Cert., p. 14a. The Court of Appeals reasoned that household waste loses its exclusion from Subtitle C once the chemical and physical nature of the waste changes.

Like incineration, removing paints, solvents, oil, bottles, cans, batteries, plastic and paper from solid waste necessarily changes the physical and chemical nature of that waste. Major new "materials recovery facilities" ("MRFs") are being built and operated across the country in an effort to recover valuable materials from the solid waste stream. Other communities rely on "source separation," where the generator (i.e., household or business) separates usable materials from the solid waste stream.

Material separation saves money and protects the environment by reducing the amount of material that must be landfilled. Separated materials such as newspaper and aluminum cans replace "virgin" materials such as trees and aluminum ore. This eliminates secondary

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[14] There is no question that ash is different chemically and physically from solid waste. This is a necessary consequence of liberating the energy stored in garbage to generate electricity or steam. It is also one reason that the leachate from ash is less of a threat to ground water than the leachate from solid waste.

environmental impacts from extracting virgin materials. In some cases material separation produces "refuse-derived fuel" ("RDF"). RDF is used as fuel at resource recovery facilities and even in existing industrial boilers and furnaces in place of or as a supplement to coal or oil.[15]

Under the Court of Appeals' reasoning, all MSW loses the benefit of any Subtitle C exclusions if the "chemical and physical composition" of the waste changes. As a result, the Court of Appeals' interpretation of RCRA strips the household waste exclusion not only from resource recovery residue but also from material separation residue.

Without a Subtitle C exclusion, residues from any material separation process must be tested under RCRA Subtitle C and, depending on test results, stringently managed as "hazardous waste". Suddenly, the cost and regulatory complexity of managing the waste from MRF, RDF and other material separation programs, like ash from resource recovery facilities, become prohibitive. The Court of Appeals' interpretation of RCRA discourages material separation and resource recovery and is inconsistent with congressional policy.

3. The Court of Appeals' Interpretation Destroys Local Planning Efforts.

Historically, cities and counties have shouldered the responsibility for planning and implementing programs to manage solid waste. Congress recognized this responsibility in providing technical and financial assistance to local governments, while mandating minimum federal standards for waste disposal facilities. 42 U.S.C.A. § 6901(a)(4) (West 1983). Local governments understand local needs, local resources and local policies. Based in this understanding, they can identify appropriate disposal and collection systems for their communities and choose either to implement those systems themselves or to rely upon private enterprise.

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[15] The preamble to the original Subtitle C regulations recognized that RDF should fall within the household waste exclusion. 45 Fed. Reg. 3309 (May 19, 1980).

RCRA emphasizes that resource recovery should be considered in developing local plans. 42 U.S.C.A. §§ 6943(a)(2), 6947(b) (West 1983). RCRA provides that resource recovery should be considered a viable alternative to landfills. See, e.g., 42 U.S.C.A. § 6902(a)(1) (West Supp. 1991) (federal assistance for planning resource recovery); § 6942(c)(10) and (11) (West Supp. 1991) (state plans must consider resource recovery facilities and markets for energy recovery); § 6943(c) (West Supp. 1991) (federal assistance for studying feasibility of resource recovery systems); § 6943(d) (West Supp. 1991) (recycling considered in sizing resource recovery facilities).

In the Pacific Northwest, local governments plan waste management under state-wide goals and priorities. Washington's cities and counties began long-term waste management planning in the early 1980s. They must update their plans regularly. Wash. Rev. Code § 70.95.110 (1989). Spokane's journey through local planning is outlined at pages 1 - 3, above. Spokane's experience illustrates how local conditions and policies shape local waste management decisions. It points out how recycling and resource recovery are options badly needed to address the waste management crisis. Finally, it demonstrates that planning for integrated waste management requires substantial resources and that implementing local choices requires long-term contractual commitments.

Amici Skagit County, Marion County and Tacoma have made similar journeys. Each community has different policies and different constraints. Nonetheless, all of them studied and debated recycling and resource recovery at the local level and then selected and implemented local choices. Amici committed to resource recovery under the belief that RCRA Section 3001(i) excluded ash from Subtitle C. Their understanding was based on the language of regulations and statutes and on court decisions which had, prior to the Court of Appeals'

ruling in this case, uniformly so interpreted Section 3001(i).[16]

The Court of Appeals' decision removes resource recovery as a viable alternative for local governments, contrary to national policy in RCRA. The cost of managing ash from resource recovery as hazardous waste is simply prohibitive.[17] For communities already implementing resource recovery, the consequences are potentially disastrous. The results of a decade of solid waste planning could become useless. Long-term contracts and financing commitments could be jeopardized. Hundreds of millions of dollars of capital improvements could become too costly to maintain. The Court of Appeals' interpretation of RCRA destroys local planning.

4. The Court of Appeals' Interpretation Undercuts State Ash Management Programs.

RCRA allows states to develop and administer their own solid and hazardous waste programs.[18] Consistent with RCRA's federal framework, several states created detailed regulatory programs to address management of ash from MSW resource recovery facilities.

For example, Washington enacted an Incinerator Ash Residue Act, Wash. Rev. Code ch. 70.138 (1989), early in 1987. In 1990 Ecology promulgated Special

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[16] Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F. Supp. 758 (S.D.N.Y. 1989), affirmed, 931 F.2d 211 (2d Cir.), cert. denied, 112 S.Ct. 453 (1991); Environmental Defense Fund, Inc. v. City of Chicago, 727 F. Supp. 419 (N.D. Ill. 1989), reversed, 948 F.2d 345 (7th Cir. 1991).

[17] As explained at pp. 9 - 11, supra, material separation would also become cost-prohibitive under the Court of Appeals' reasoning.

[18] By establishing state programs at least as stringent as parallel federal programs, states may administer the Subtitle C hazardous waste program, 42 U.S.C.A. §§ 6902(a)(7), 6926(b) (West Supp. 1991), obtain federal financial assistance for Subtitle D solid waste programs, 42 U.S.C.A. §§ 6943(a) (West 1983), 6945(c) (West Supp. 1991), and 6947(a) (West 1983), and administer the federal underground storage tank regulatory program, 42 U.S.C.A. § 6991c (West Supp. 1991).

Incinerator Ash Management Standards, Wash. Admin. Code ch. 173-306 (1990), to implement the Act. Ash generators in Washington must develop approved ash management plans with measures to minimize ash volume and maintain its quality, as well as to provide for its safe transport and disposal. Wash. Admin. Code § 173-306-200 (1990). Ash must be tested quarterly; Ecology monitors the results. Id. Ash may be disposed of only in dedicated ash landfills, called monofills, that meet detailed standards for siting, performance, monitoring, and design. Wash. Admin. Code §§ 173-306-350, -450 (1990). Monofill operators must provide financial security to assure their facilities' safe closure. Wash. Admin. Code § 173-306-470 (1990).

Uncertainty regarding the scope of RCRA Section 3001(i) threatens the viability of Washington's ash program. Although developed specifically to address the characteristics of ash from MSW resource recovery, Washington's ash program is not intended to be identical to Subtitle C requirements for hazardous waste management. For example, Washington's ash program does not require each shipment of ash to be tracked with manifest documents in triplicate. Compare, Wash. Admin. Code ch. 173-306 (1990) with 40 CFR § 262.20 (1991). Other states have programs specifically designed for ash management that are not identical to the Subtitle C program.[19]

So long as the Seventh Circuit's decision remains in effect, the status of state ash programs is unclear. At worst, these programs and the resource recovery and ash landfills designed and built in accordance with their provisions could be rendered legally obsolete. Supreme Court review of the Seventh Circuit's decision is required to resolve this uncertainty.

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[19] See, e.g. Mich. Comp. Laws §§ 299.432a - .432b (1991); Fla. Stat. Ann. § 403.7045 (West Supp. 1992); Fla. Admin. Code ch. 17-702 (1990); Code Me. R. ch. 403 (1990); Mass. Regs. Code title 310, §§ 19.119, .131 (1990); Conn. Agencies Regs. §§ 22a-209-1, -8, -14 (1990); N.Y. Comp. Codes R. Regs. title 6, §§ 360-2.14, -3.5 (1991); N.H. Code Admin. R. Dept. Env. Serv. Part Env. Wm 2602 (1991); 25 Pa. Code § 75.37 (1990).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 91-1328

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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act exempts a resource recovery facility's municipal waste combustion ash from regulation as a hazardous waste under Subtitle C of that Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners City of Chicago and its mayor operate a municipal incinerator that burns solid waste and recovers energy, leaving a residue of municipal waste combustion (MWC) ash that is deposited in a landfill. Respondents Environmental Defense Fund, Inc., *et al.* (EDF) brought this action against petitioners, alleging that they were violating provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to dispose of the MWC ash in accord-

ance with the hazardous waste management requirements of RCRA Subtitle C, 42 U.S.C. 6921-6939. The United States District Court for the Northern District of Illinois granted summary judgment for petitioners, ruling that RCRA Section 3001(i), 42 U.S.C. 6921(i), exempts the ash residue from Subtitle C regulation. See Pet. App. 18a-33a. A divided court of appeals reversed. *Id.* at 1a-17a.

1. RCRA is a comprehensive environmental statute that, among other things, grants the Environmental Protection Agency (EPA) authority to regulate hazardous wastes from "cradle to grave." *Environmental Defense Fund, Inc.* v. *EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Subtitle C of RCRA requires EPA to identify and list hazardous wastes, § 3001, 42 U.S.C. 6921, and to promulgate standards governing hazardous waste generators and transporters, §§ 3002, 3003, 42 U.S.C. 6922, 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities, § 3004, 42 U.S.C. 6924. EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements when they treat, store, or arrange for transportation or disposal of hazardous waste. See 40 C.F.R. Pt. 262.

In 1980, EPA issued regulations, pursuant to Section 3001 of RCRA, identifying and listing certain solid wastes as hazardous wastes. See 45 Fed. Reg. 33,084. Based on the agency's interpretation of Congress's intent, EPA excluded various solid wastes that might otherwise be treated as hazardous waste from regulation under Subtitle C. See *id.* at 33,096-33,097. EPA specifically provided a "household waste exclusion," stating in relevant part:

The following solid wastes are not hazardous wastes:

> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

45 Fed. Reg. at 33,120 (codified as amended at 40 C.F.R. 261.4(b)(1) (1982)). See Pet. App. 21a-22a.

Four years later, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, which revised and supplemented RCRA in various respects. That Act added Section 3001(i), entitled "Clarification of household waste exclusion." 42 U.S.C. 6921(i). Section 3001(i) states:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if —
>
> (1) such facility —
>
> (A) receives and burns only —
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other

> appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. 6921(i). Shortly thereafter, EPA revised its regulation containing the "household waste exclusion." 50 Fed. Reg. 28,702 (1985). EPA retained its original regulatory language, but added the language of Section 3001(i) virtually verbatim. See 40 C.F.R. 261.4(b)(1). See Pet. App. 22a-23a.

2. Since 1971, petitioner City of Chicago has owned and operated a resource recovery incinerator, the Northwest Waste-to-Energy Facility. The facility burns approximately 350,000 tons of solid waste each year, amounting to about 14% of the City's solid waste, and produces energy that is both used within the facility and sold to other companies. The City disposes of the combustion residue—110,000 to 140,000 tons of MWC ash per year—at a landfill in Three Oaks, Michigan. Prior to this suit, the City, like many other municipalities, did not manage MWC ash as an RCRA Subtitle C hazardous waste. Pet. App. 1a-3a, 19a.[1]

In 1988, EDF filed a complaint against petitioners under the citizen suit provisions of RCRA, § 7002, 42 U.S.C. 6972, alleging that petitioners were violating RCRA and EPA's RCRA regulations governing the management of hazardous waste. According to EDF, the MWC ash from the Northwest Waste-to-Energy Facility contained sufficient levels of lead and cadmium to subject the residue to regulation as a hazardous waste under RCRA Subtitle C. Petitioners responded that RCRA

[1] As of 1991, approximately 150 facilities incinerated municipal solid waste in a resource recovery facility. S. Levy, *Municipal Waste Combustion Inventory* 1 (EPA July 1992). In 1990, those facilities burned in aggregate approximately 29.7 million tons of municipal solid waste out of an estimated 195.7 million tons generated. *Characterization of Municipal Solid Waste in the United States: 1992 Update* 3-2 (EPA July 1992). See also Pet. 2-3.

Section 3001(i) excluded the MWC ash from Subtitle C requirements. The parties filed cross-motions for summary judgment contesting the application of Section 3001(i). Pet. App. 2a-3a, 18a-20a.

EDF claimed that although Section 3001(i) exempted the City's incineration of municipal solid waste from RCRA Subtitle C requirements related to "treating, storing, disposing of, or otherwise managing hazardous wastes," 42 U.S.C. 6921(i), it did not exempt the City from Subtitle C requirements related to generation of a distinct waste product, the MWC ash. Petitioners responded that Section 3001(i)'s reference to "disposing of, or otherwise managing hazardous wastes" exempted the entire process of incinerating the waste in a resource recovery facility, including management of the ash residue. Pet. App. 3a, 20a, 23a-24a.

The district court agreed with petitioners that RCRA Section 3001(i) exempts MWC ash produced at resource recovery facilities from regulation as hazardous waste. Pet. App. 3a, 20a-28a. The court denied petitioners' motion for summary judgment, however, and allowed EDF to engage in discovery on whether the Chicago facility adequately met Section 3001(i)'s provisions prohibiting the facility from accepting commercial and industrial hazardous wastes. Pet. App. 3a, 28a-29a. EDF subsequently stipulated that it would not contest the adequacy of the facility's compliance with those prohibitions and that it would not oppose petitioners' renewed motion for summary judgment, which the court granted. See *id.* at 3a-4a, 30a-33a.

3. The court of appeals reversed. As a preliminary matter, the court rejected petitioners' claim that intervening legislation had rendered the matter moot. Pet. App. 4a-5a. Turning to the merits, the court observed that petitioners and EDF both relied on the "plain words of section 3001" and that "EPA's interpretation and the legislative history of the statute do little to resolve this stand-off." *Id.* at 6a-7a. See *id.* at 7a-14a (analyzing

those sources). The court ultimately chose to rely on "what the statute actually says." *Id.* at 14a.

The court reasoned that Section 3001(i) "mentions 'the treating, storing, disposing of or otherwise managing' of the household and commercial waste, but fails to include among those activities *generating* a different waste product entirely." Pet. App. 14a. The court examined the statutory definitions of the quoted terms and determined that they "exclude 'generation,' which is separately defined as 'the act or process of producing hazardous waste.' 42 U.S.C. 6903(6)." *Id.* at 15a. It concluded:

> There is no overlap whatsoever then between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

Id. at 15a-16a. The court accordingly held that "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." *Id.* at 16a.

Judge Ripple dissented. He would have affirmed the judgment for the reasons set forth in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991), which held that MWC ash from resource recovery facilities is exempt from regulation under Subtitle C. Pet. App. 17a.[2]

[2] Because of the apparent conflict with the *Wheelabrator* decision, the court of appeals' opinion was circulated among all active circuit judges prior to release. No judge requested rehearing en banc. See Pet. App. 1a n.*

DISCUSSION

Petitioners seek review of the court of appeals' determination that MWC ash from resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. They contend that the court's decision is incorrect, that it raises an important question of federal statutory law, and that it is in square conflict with the Second Circuit's decision in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 931 F.2d 211 (1991), aff'g 725 F. Supp. 758 (S.D.N.Y. 1989), cert. denied, 112 S. Ct. 453 (1991). See Pet. 9-10. Respondents reply that the court's decision is correct, but they agree that the issue is important and a circuit conflict exits, and they accordingly urge that the petition for a writ of certiorari should be granted. EDF Br. 8. In light of recent regulatory developments, we suggest that the petition should be granted, the decision vacated, and the case remanded to the court of appeals for further consideration.

1. As the court of appeals observed, petitioners and EDF both contend that the plain language of Section 3001(i) supports the diametrically different interpretations they advocate. See Pet. App. 6a-7a; Pet. 12; EDF Br. 14-15. We believe, however, that the statutory language is ambiguous with respect to the precise issue presented here. Section 3001(i) states that a resource recovery facility "recovering energy from the mass burning of municipal solid waste" shall not be deemed "to be treating, storing, disposing of, or otherwise managing hazardous wastes" if certain conditions (including limitations on what wastes the facility "receives and burns") are met. 42 U.S.C. 6921(i). But it is unclear from the statutory text whether "recovering energy from the mass burning of municipal solid waste" describes the entire recovery process—including disposal of ash residue—or something less.

If Congress intended that Section 3001(i) apply to the entire resource recovery process, the statute would ex-

empt from Subtitle C regulation "treating, storing, disposing of, or otherwise managing" the ash residue. If Congress intended, however, that Section 3001(i) apply to some more limited part of the process—such as only the incineration itself—the statute arguably would not exempt disposal of the incineration residue from Subtitle C regulation. As the lower courts have acknowledged, the statutory text is "subject to varying interpretations" (Pet. App. 12a) and does not provide a definitive answer to Congress's intent. See *Wheelabrator*, 725 F. Supp. at 764. Simply put, Congress has "not directly spoken to" the precise question presented in this case. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In that situation, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844.[3]

At the time that the court of appeals considered this case, EPA's position on application of Section 3001(i) to MWC ash was subject to controversy. When EPA promulgated its 1980 household waste exclusion, it clearly contemplated that the regulatory exclusion would exempt incineration residue from Subtitle C regulation. EPA stated in the preamble to that regulation that it was excluding the entire household waste stream from regulation, observing:

> Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.

[3] As this Court has explained, "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 933 (1990). "That is a task infused with judgment and discretion, requiring the 'accommodation of conflicting policies that were committed to the agency's care.'" *Ibid.*

45 Fed. Reg. 33,099 (1980). EPA explained that such wastes, however, "must be transported, stored, treated and disposed in accord with applicable State and federal requirements concerning management of solid waste (including any requirements specified in regulations under Subtitle D of RCRA)." *Ibid.*

Five years later, when EPA amended the household waste exclusion in response to Congress's enactment of Section 3001(i), EPA expressed doubt whether MWC ash derived from both household and nonhazardous commercial and industrial waste should be excluded. EPA stated in the preamble to the amended regulation:

> The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic [of hazardous waste]. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residues.

50 Fed. Reg. 28,725-28,726 (1985). The agency continued:

> EPA believes that the principal purpose of section 3001[i] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the

> regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

Id. at 28,726. See Pet. App. 26a n.4[4]

Since 1985, EPA officials have indicated that the analysis contained in the 1985 regulatory preamble may be incorrect and have suggested that Congress clarify its intent.[5] Congress subsequently included a provision

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[4] EPA also stated, however, that the Hazardous and Solid Waste Amendments do not "impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28,726 (1985). EPA determined that "any additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arose about the residues." *Ibid.*

[5] In 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response stated to a Senate subcommittee that "[t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C." *Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987). See Pet. App. 10a-11a, 27a. In 1988, the Administrator testified to a House subcommittee that "there is ambiguity within the law and I think the law should be clarified." *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988). In 1989, EPA's Director of the Office of Solid Waste stated to a House subcommittee that EPA continued to follow the 1985 interpretation, but she noted that there is "substantial controversy surrounding that interpretation," "the law is ambiguous given it is silent with regard to treatment of ash under [Section 3001(i)]," and "it needs to be clarified." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before*

in the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, stating:

> For a period of 2 years [until November 15, 1992] * * * ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act.

§ 306, 104 Stat. 2584. Since enactment of that provision, however, Congress has taken no action to clarify whether it intends MWC ash to be exempt permanently from Subtitle C regulation.[6]

In light of the considerable uncertainty surrounding the issue, EPA's Administrator recently issued a policy directive to clarify the agency's interpretation of Section 3001(i). See App., *infra*, 1a-10a. The Administrator's directive, issued to all EPA Regional Administrators and made publicly available, announces EPA's decision under Section 3001(i) of RCRA "to treat ash gener-

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the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 33 (1989). See Pet. App. 11a-12a. See also *Wheelabrator*, 725 F. Supp. at 767-768.

[6] In the past several years, Congress has had before it various provisions that would clarify how MWC ash should be regulated. In 1986, Congress considered legislation that would have required specific standards for facilities disposing of MWC ash. See 53 Fed. Reg. 33,314, 33,328 (1988). In 1988, a bill was introduced that would have allowed disposal of MWC ash in certain RCRA Subtitle D landfills that met additional requirements (the so-called "D Plus" approach). See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988). See also Pet. App. 8a-9a. In its recently concluded Session, Congress considered a bill that would amend RCRA Subtitle D to establish a separate regulatory framework for MWC ash. When Congress adjourned, that provision remained only in the Senate version of the bill. See S. Rep. No. 301, 102d Cong., 2d Sess. 56-60 (1992).

ated from the combustion of nonhazardous municipal solid waste at resource recovery facilities * * * as exempt from hazardous waste regulation under RCRA Subtitle C." App., *infra*, 1a-2a. That decision "supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation." *Id.* at 2a.

2. EPA's decision that Section 3001(i) exempts MWC ash from RCRA Subtitle C regulation is a significant regulatory development bearing on the courts' interpretation of the statute. Under *Chevron*, a court interpreting a statute administered by an agency must give deference to the agency's interpretation if that interpretation is "reasonable." *Chevron*, 467 U.S. at 844. See, *e.g.*, *United States* v. *Alaska*, 112 S. Ct. 1606, 1610 (1992); *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 647-648 (1990); *Sullivan* v. *Everhart*, 494 U.S. 83, 88-89 (1990); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 722 (1989). As this Court has explained, the principle of deference to administrative interpretations

> has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation.

Chevron, 467 U.S. at 844 (citations omitted).

Chevron's well-settled analysis applies here. The Administrator's directive expresses the expert agency's view on the meaning of an ambiguous provision of a complex statute. As the directive explains, EPA's decision attempts to reconcile the text of Section 3001(i), its legislative history, and the underlying policies of RCRA, which include the goals of protecting the environment and promoting resource recovery from nonhazardous

solid waste. See App., *infra*, 2a-10a. The directive clarifies the agency's interpretation of Section 3001(i) with respect to the issue presented in this case. The proper inquiry now is whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843. See *Alaska*, 112 S. Ct. at 1610; *LTV Corp.*, 496 U.S. at 648; *Mead Corp.*, 490 U.S. at 722. More precisely, the question is whether the agency's interpretation is "reasonable," *Pauley*, 111 S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart*, 494 U.S. at 89, quoting *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987).

3. We suggest that this Court grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the court of appeals for further consideration in light of the Administrator's policy directive. Although this Court could itself undertake the *Chevron* analysis, the more appropriate course would be to allow the court of appeals to make that inquiry in the first instance—particularly because no appellate court has considered the issue in light of the Administrator's recent directive. See, *e.g.*, *Holland* v. *First Virginia Banks, Inc.*, 112 S. Ct. 1152 (1992) (remanding for further consideration in light of the Civil Rights Act of 1991); *State Tax Comm'n* v. *Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988) (remanding for further consideration in light of proposed state regulations); *Oberly* v. *Baltimore & O. R.R.*, 479 U.S. 980 (1986) (remanding for further consideration in light of position asserted by the United States as amicus curiae).

Significantly, the court of appeals did not purport to engage in a *Chevron* analysis. That court apparently concluded that statements contained in the 1980 and 1985 RCRA Federal Register notices and subsequent statements by EPA officials to congressional subcommittees, see pp. 8-11, *supra*, failed to articulate an unequivocal agency position on the matter to which deference could

be accorded. See Pet. App. 12a (stating that "[t]he see-sawing statements from the EPA to which the district court gave 'little weight' deserve no weight at all"). The Administrator's policy directive, however, eliminates any doubt as to the agency's position on the question posed here and calls for application of the principles this Court expressed in *Chevron*.[7]

Because the Administrator's decision is likely to affect this case significantly, it would be appropriate to remand the case to the court of appeals for further consideration in light of his policy directive. A remand would facilitate final resolution by allowing the court of appeals to consider and resolve in the first instance the parties' arguments concerning the applicability of *Chevron*. If on remand the court of appeals affords *Chevron* deference to EPA's interpretation, the existing conflict between the Second Circuit's decision in *Wheelabrator* and the Seventh Circuit's decision in this case will be eliminated, thereby obviating the need for further review by this Court. We believe that outcome is likely, because under proper application of *Chevron* principles, EPA's interpretation of Section 3001(i) should be upheld. The reasons are these.

EPA's interpretation of Section 3001(i) is both "rational and consistent with the statute." *Everhart*, 494 U.S. at 89. As the Administrator's directive explains, Congress enacted Section 3001(i) to clarify EPA's 1980 household waste exclusion, which exempted household waste from Subtitle C regulation "in all phases of its management, [including] residues remaining after treatment (e.g., incineration, thermal treatment)." 45

[7] The Administrator's directive to EPA's Regional Administrators is a binding interpretation that establishes agency policy and is therefore a legitimate source for *Chevron* deference. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988). Cf. *Alaska*, 112 S. Ct. at 1618-1619, citing *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may establish policy "through administration of agency programs").

Fed. Reg. 33,099 (1980). See App., *infra*, 2a-3a. Section 3001(i) makes clear that when a resource recovery facility incinerates household waste in combination with nonhazardous commercial and industrial waste and in compliance with prescribed requirements, the facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). See App., *infra*, 3a-4a. In other words, the household waste exclusion, which exempts household waste "in all phases of its management" (45 Fed. Reg. 33,099 (1980)), continues to apply when a resource recovery facility commingles household waste with other nonhazardous waste and treats, stores, disposes of, or otherwise manages the combined waste streams.

As the Administrator's directive explains, his interpretation is entirely consistent with the statute. See App., *infra*, 2a-4a. Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" strongly suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues. The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes (see Pet. App. 15a-16a) does not undermine that conclusion. The absence of that term likely reflects Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms it used. See RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment). At most, Congress's silence on that point highlights the fact that Congress has "left a gap for the agency to fill." *Chevron*, 467 U.S. at 843-844. See App., *infra*, 4a n.2.

The Administrator's interpretation of Section 3001(i) is especially compelling when the statute is viewed in its

legal context. When Congress acted, it presumably was aware that EPA interpreted the household waste exclusion to apply to such waste "in all phases of its management," including disposal of incineration residues. See 45 Fed. Reg. 33,099 (1980).[8] Congress did not question or overrule that interpretation when it clarified that the household waste exclusion would apply to a resource recovery facility that burns commingled wastes. And to the extent the legislative history is relevant, it indicates that, in enacting Section 3001(i), Congress intended to retain EPA's interpretation and to apply that interpretation to such commingled wastes. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). See App., *infra*, 4a-6a & nn.2-3.

The Administrator's interpretation also is consistent with the objectives Congress sought to achieve in enacting Section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste. See App., *infra*, 6a-7a. Based on EPA's scientific judgment and the safeguards the agency has instituted in implementing other provisions of RCRA, the Administrator has determined that those objectives "are best served by exempting MWC ash from hazardous waste regulation." *Id.* at 7a-8a. That determination rests on "significant expertise" and "entail[s] the exercise of judgment grounded in policy concerns." *Pauley*, 111 S. Ct. at 2534. "In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Ibid.* See *Chevron*, 467 U.S. at 844-845, quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).[9]

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[8] Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

[9] This Court has stated that as a general matter, "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley*,

In sum, it is likely that the court of appeals would give deference to the Administrator's determination that MWC ash is exempt from regulation under RCRA Subtitle C. If the court of appeals defers to the Administrator, it will eliminate the circuit conflict and obviate any need for review by this Court. We therefore suggest that the Court grant the petition, vacate the judgment, and remand the case to the court of appeals for reconsideration in light of the Administrator's policy directive.

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111 S. Ct. at 2535. In this case, however, the EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented here. See pp. 9-10 & note 5, *supra*. Thus, EPA has always acknowledged that there is a statutory gap that must be filled, and the fact that EPA's interpretation has evolved over time is by itself no reason to deny deference. As the Court has explained, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. Accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). The question for the reviewing court remains whether the agency's interpretation is "reasonable," *Pauley*, 111 S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart*, 494 U.S. at 89.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of the EPA Administrator's policy directive determining that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

Respectfully submitted.

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OCTOBER 1992

APPENDIX

[SEAL] UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

[Sept. 18, 1992]

The Administrator

MEMORANDUM

TO: All Regional Administrators

SUBJECT: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)

PURPOSE

This Memorandum sets forth the United States Environmental Protection Agency's ("EPA" or "Agency") decision under section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i),[1] to treat ash generated from the

[1] As part of the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA by adding section 3001(i), which provides, in pertinent part:

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for purposes of regulation under [Subtitle

combustion of nonhazardous municipal solid waste at resource recovery facilities (hereinafter "MWC ash") as exempt from hazardous waste regulation under RCRA Subtitle C. EPA believes that MWC ash can be regulated in a manner that will be protective of human health and the environment under RCRA Subtitle D. The determination set forth herein supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. *See* 50 Fed. Reg. 28702, 28725-26 (1985).

ANALYSIS

Text of the Statute

EPA's determination that MWC ash is exempt from hazardous waste regulation is consistent with the text of section 3001(i) As proclaimed by the title of section 3001(i)—"Clarification of household waste exclusion"—in enacting that provision, Congress was building upon the regulatory framework it earlier had established. In enacting RCRA in 1976, Congress indicated that solid waste from households, which frequently includes materials that may contain hazardous constituents, should not be regulated as hazardous waste under Subtitle C. S. Rep. No. 94-988, 94th Cong., 2d Sess. 16 (1976). EPA codified Congress' intent in the so-called "household waste exclusion,"

C] if . . . such facility . . . receives and burns only . . . household waste . . . and solid waste from commercial or industrial sources that does not contain hazardous waste . . . .

RCRA section 3001(i)(1), 42 U.S.C. § 6921(i)(l). Section 3001(i) is codified in EPA's regulations as part of the household waste exclusion. 40 C.F.R. 261.4(b)(l).

promulgated in 1980, which provides that "any material . . . derived from households . . . is not hazardous waste . . . ." 40 C.F.R. 261.4(b)(1).

In the preamble to the Federal Register notice announcing the household waste exclusion, EPA clearly stated that the exclusion extends to ash remaining after household waste is incinerated: "Since household waste is excluded in all phases of its management, residues after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33066, 33098 (1980). The Agency justified its determination that ash derived from the incineration of household waste is subject to the exclusion on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." *Id.* (emphasis added).

In enacting section 3001(i), Congress arguably extended the regulatory exclusion for ash derived from the incineration of household waste to similar residues generated by resource recovery facilities from the incineration of household waste *and* nonhazardous commercial and industrial solid waste. To the extend that household waste alone is incinerated, section 3001(i) coincides with EPA's earlier interpretation of the household waste exclusion as exempting ash derived from such waste from hazardous waste regulation. The inclusion in section 3001(i) of nonhazardous commercial and industrial waste, along with household waste, suggests that Congress may have intended that MWC ash resulting from the combustion of those combined wastes also should not be subject to regulation as a hazardous waste.

In addition, congressional intent to exempt MWC ash from hazardous waste regulation is suggested by the portion of section 3001(i) which provides that a

resource recovery facility shall not be deemed to be "treating, storing *disposing of*, or otherwise managing" hazardous waste. (Emphasis added.) Nothing ordinarily is "disposed of" when a resource recovery facility receives or stores a nonhazardous solid waste, and the burning of such waste generally is regarded as a type of treatment under RCRA. *See* RCRA sections 1004(3) and (34), 42 U.S.C. § 6903(3) and (34) (definitions of "disposal" and "treatment"). As a result, since MWC ash ordinarily is the only waste "disposed of" by such a facility, Congress arguably intended that MWC ash not be regarded as a hazardous waste.

For the foregoing reasons, EPA believes that the text of section 3001(i) is consistent with the Agency's determination that MWC ash is exempt from hazardous waste regulation.

Legislative History

EPA's determination that MWC ash is exempt from hazardous waste regulation also is consistent with the legislative history of section 3001(i). First, a Report of the Senate Committee on Environmental and Public Works addressing section 3001(i) specifically states that "[a]ll waste management activities of such a [resource recovery] facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."[2] S. Rep.

[2] Unlike the legislative history for section 3001(i), the statute does not expressly state that the "generation" of waste by a resource recovery facility is included within the exemption. At most, the absence of that term reflects that Congress did not expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that MWC ash be

No. 98-284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).[3] Since MWC ash ordinarily is the only waste "generated" by a resource recovery facility, Congress arguably demonstrated its intent that MWC ash not be regarded as a hazardous waste.

Second, the Senate Report states that section 3001(i) was enacted to "encourage commercially viable resource recovery facilities and . . . remove impediments that may hinder their development and operation." S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983). As noted above, one of the significant features of section 3001(i) is that it applies to resource recovery facilities that burn both household waste *and* nonhazardous commercial and industrial waste. If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report could be substantially frustrated. As a practical matter, the cost benefit to a resource recovery facility in being able to burn both household and nonhazardous commercial and industrial waste would be significantly reduced if MWC ash must be disposed of as a hazardous waste, as discussed more fully below.

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regulated as a hazardous waste. In such a circumstance, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein, as discussed more fully below.

[3] The Senate Report is entitled to special weight because the Conference Committee adopted, without change, the Senate version of section 3001(i). H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5677. In passing the Senate version of section 3001(i), Congress also impliedly adopted the Senate's interpretation of that provision set forth in the Senate Report.

Third, the Senate Report refers to the wastes being incinerated in resource recovery facilities as "waste streams," as follows:

> Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous *waste streams* from a variety of sources other than "households." . . . New section 3001[i] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

Id. (emphasis added). As noted above, the Agency justified its determination that ash derived from the incineration of household waste is excluded from hazardous waste regulation on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." 45 Fed. Reg. 33066, 33098 (1980) (emphasis added). In also using the term "waste stream" in the Senate Report, Congress arguably demonstrated its intent that section 3001(i) be construed as extending the household "waste stream" exclusion to the entire "waste stream" at a resource recovery facility, including MWC ash derived from the burning of combined household *and* nonhazardous commercial and industrial waste.

In sum, the legislative history of section 3001(i) is consistent with the Agency's determination to exempt MWC ash from hazardous waste regulation.

Policy Considerations

As discussed above, EPA believes that the text and legislative history of section 3001(i) are consistent with the Agency's view that MWC ash is exempt from

hazardous waste regulation. Since Congress did not in the statute or legislative history expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein. EPA believes that the two statutory goals embodied in section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste—are best served by exempting MWC ash from hazardous waste regulation.

EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D. In particular, EPA recently promulgated new criteria for municipal solid waste landfills at 40 C.F.R. Part 258, 56 Fed. Reg. 50978 (1991). Municipal landfills and monofills receiving MWC ash must comply with those criteria.[4] The Part 258 criteria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure care

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[4] In the preamble to the Federal Register notice announcing the final Part 258 criteria, EPA stated that "[t]he purpose of part 258 is to establish minimum national criteria for municipal solid waste landfills, including [such landfills] used for . . . disposal of nonhazardous municipal waste combustion (MWC) ash (whether the ash is co-disposed or disposed of in an ash monofill)." *See also* response to comment document nos. 155, 168, 171, 172, and 199 in the public record for the Part 258 rulemaking (docket number F-91-CMLF-FFFFF).

requirements. The Agency believes the disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment.[5]

If information comes to EPA's attention suggesting that MWC ash is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations. In addition, at individual sites, if the disposal of MWC ash may present an imminent and substantial endangerment to human health or the environment, EPA may require responsible persons to undertake appropriate action under section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

Resource recovery from municipal solid waste is an important component of EPA's integrated waste management approach, which involves the complementary use of a variety of practices to safely and effectively manage municipal solid waste.[6] Such activ-

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[5] The promulgation of the Part 258 criteria is an important step in ensuring that MWC ash can and will be regulated in a manner that will be protective of human health and the environment under Subtitle D. The promulgation of those criteria also has served as an impetus for the Agency's reevaluation of its earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. 50 Fed. Reg. 28702, 28725-26 (1985).

[6] That approach establishes a hierarchy that prefers source reduction (i.e., the design, manufacture, purchase, or use of materials to reduce the amount or toxicity of solid waste generated) and recycling (i.e., the process by which materials are collected and used as raw materials for new products) over solid waste combustion (including combustion for resource recovery) and landfilling. Solid waste combustion, however, has

ity advances the statutory objective of RCRA (the *Resource* Conservation and *Recovery* Act) to reduce the volume of waste that requires disposal. *See id.* at section 1002(b)(8), 42 U.S.C. § 6901(b)(8). It also advances the statutory objective of recovering significant amounts of energy from solid waste. *See id.* at sections 1002(d)(2), 42 U.S.C. § 6901(d)(2), and 1003(a)(11), 42 U.S.C. § 6902(a)(11). For those reasons, EPA agrees with Congress' view, set forth in the Senate Report discussed above, that impediments hindering the development and operation of commercially viable resource recovery facilities should be eliminated where practicable.

For nonhazardous municipal solid waste that can be disposed of either in a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of those two alternatives significantly is impacted by the application of section 3001(i) to MWC ash.[7] If MWC ash is not exempt under 3001(i) from hazardous waste regulation, a strong economic incentive may exist to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust that waste in resource recovery facilities. The costs associated with the disposal of MWC ash in Subtitle C facilities are dramatically higher than in

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played and will continue to play an important role in the Agency's integrated waste management approach because the entire solid waste stream cannot be reduced through source reduction and recycling. EPA encourages communities to choose the mix of solid waste options that are most appropriate for them, considering local economic, environmental, and other factors.

[7] In addition to cost, Subtitle D landfill capacity limitations also may be a significant factor in determining whether municipal solid waste is combusted in resource recovery facilities.

Subtitle D landfills. Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

CONCLUSION

In sum, exempting MWC ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste. For the foregoing reasons, EPA has determined that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

/s/ William K. Reilly
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No. 91-1328

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,
Petitioners
v.
ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

In response to this Court's invitation, the Solicitor General recently filed a brief in this case expressing the views of the United States. The sole purpose of this supplemental brief is to respond to the Solicitor General's novel suggestion that the views of the United States Environmental Protection Agency (EPA) contained in the government's brief provide a reason to grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the views expressed by EPA.[1]

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[1] This supplemental brief is filed pursuant to Rule 15.7 of the Rules of this Court permitting a party to file a supplemental brief in response to an "intervening matter not available at the time of the

1. There is no merit to the Solicitor General's suggestion that the case should now be remanded for further proceedings in the court of appeals. Such a disposition is typically warranted where, unlike this case, there has been an intervening decision of this Court bearing on the issues raised by the petition pending before the Court.[2] Less typical, and still readily distinguishable from the circumstances of this case, are those occasions when the Court grants, vacates, and remands a petition when the party that prevailed in the lower court effectively confesses error or otherwise fundamentally changes its position before the Court in response to the petition.[3] Finally, this is not a circumstance where there has been an intervening change in the law at issue in the case. This case concerns the meaning of a federal statute, not the meaning of federal regulations,[4] and Congress has not amended the statutory provision at issue.[5]

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party's last filing."

[2] See generally Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L. Q. 5 (1983).

[3] See, *e.g.*, *Federal Labor Relations Authority v. Department of Agriculture*, 488 U.S. 1025 (1988) (intervening change in Department of Agriculture Regulations); *Petty v. United States*, 481 U.S. 1034 (1987) (confession of error).

[4] Compare *Burns v. Hein*, 419 U.S. 989 (1974) (grant, vacate, and remand in light of intervening clarification of Department of Agriculture regulations where question presented was whether challenged state regulations were consistent with federal regulations).

[5] Compare *Immigration and Naturalization Service v. National Center for Immigrants' Rights*, 481 U.S. 1009 (1987) (remand based on intervening federal legislation).

The Solicitor General relies on three cases in support of his claim that a remand is nonetheless warranted. See U.S. Br. 13, citing *Holland v. First Virginia Banks, Inc.*, 112 S.Ct. 1152 (1992); *Oberly v. Baltimore & O. R.R.*, 479 U.S. 980 (1986); *State Tax Comm'n v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988). None supports that claim.

a. In *Holland v. First Virginia Banks, Inc.*, 112 S.Ct. 1152 (1992), a remand was warranted because there had been an intervening change in the federal statutory program at issue, with congressional enactment of the Civil Rights Act of 1991. As the Solicitor General acknowledges (U.S. Br. 11 n.6), Congress has not similarly amended the Resource Conservation and Recovery Act, which is the statute here at issue.

b. In *Oberly v. Baltimore & O. R.R.*, 479 U.S. 980 (1986), a remand was appropriate because the court of appeals had relied in its initial ruling on an amicus brief filed by the Environmental Protection Agency that the United States Department of Justice had not authorized or approved, and which the United States subsequently disavowed in a brief filed with this Court. See *Baltimore & O.R.R.*, 837 F.2d 108, 110 (3rd Cir. 1988). Here, by contrast, the lower court ruling was not tainted by its mistaken reliance on EPA's view.

To be sure, as described in the Solicitor General's brief, the EPA Administrator has changed his view on the meaning of Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), which is the provision here at issue. But such an intervening development does not warrant a remand to the court of appeals for reconsideration of its prior ruling. Unlike in *Oberly*, there is no reason to believe

that the court of appeals is "likely" (U.S. Br. 17) to change its ruling in response to the EPA memorandum appended to the Solicitor General's brief.

The Seventh Circuit concluded that municipal incinerator ash is a hazardous waste subject to the requirements of Subchapter C of RCRA based on the "statute's plain language." Pet. App. 16a. The court rejected legislative history suggesting a contrary result because it would lead to an "absurd" reading of the law. *Id.* The court further concluded that the "see-sawing statements from the EPA" and the agency's "waffling" regarding the issue "deserve no weight at all." *Id.* at 12a. That EPA has flip-flopped is hardly likely to prompt the court of appeals now to give the agency deference, particularly when the agency's newly-discovered view is the very one that the court dubbed too "absurd" to overcome the plain meaning of the statutory language. *Id.* at 16a.

Nor should the Seventh Circuit do otherwise. Contrary to the Solicitor General's claim (U.S. Br. 11), EPA has not simply "clarif[ied]" its earlier views. EPA has adopted a construction of Section 3001(i) totally at odds with its prior authoritative reading of that provision. It is well settled that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2535 (1991); see *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). And, in no event can an agency interpretation overcome the plain meaning of the statutory language. See, *e.g.*, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2770 (1990).

c. Finally, this Court's remand in *State Tax Comm'n v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988), likewise provides no support for remand. Indeed, *Herzog Bros.* underscores the impropriety of such a disposition in the circumstances of this case. In *Herzog Bros.*, the question presented was whether the Federal Indian Trader Law preempted certain state tax laws. In its initial opinion, the New York Court of Appeals had held that the federal law preempted the state tax. See *Herzog Bros. Trucking, Inc. v. State Tax Com'n*, 69 N.Y.2d 536, 508 N.E.2d 914 (1987). As the Solicitor General explains, this Court remanded for the state court's reconsideration in light of subsequently-proposed state tax regulations.

But what the Solicitor General declines to note is that the state court, on remand, adhered to its earlier position. See *Herzog Bros. Trucking, Inc. v. State Tax Com'n*, 72 N.Y.2d 720, 533 N.E. 2d 255 (1988). The state court found unpersuasive the Solicitor General's suggestion in its brief before this Court that the state court might have read the preemptive scope of federal law too broadly, tersely concluding that "the cases relied upon by the Solicitor General were fully considered by us in our earlier opinion." 72 N.Y.2d at 724; 533 N.E.2d at 257. And, the court declined altogether to consider the validity of the new state tax regulations on the ground that "a decision on their validity upon the present record would constitute an advisory opinion involving hypothetical future transactions of unknown parties." 72 N.Y.2d at 725; 533 N.E.2d at 258.

Perhaps a remand was nonetheless appropriate in *Herzog* because in that case, unlike this case, the petition did not otherwise present a legal issue warranting this Court's plenary review. But, here, where the petition

plainly does present such an issue, there is no comparable reason to require the parties to engage in an equally valueless lower court proceeding.

2. There is, moreover, yet another reason to reject the Solicitor General's suggested disposition. This Court has made clear that the principle of judicial deference to agency interpretation of statutory language does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213.

The Solicitor General's appending of the EPA memorandum to its brief (see U.S. Br. 1a-11a) is a thinly disguised effort to avoid the Court's precedent in this area for the illegitimate purpose of claiming judicial deference to which EPA would in no event be entitled. The reason for the sudden appearance of the EPA memorandum, just before the filing of the Solicitor General's brief is obvious, notwithstanding that memorandum's careful avoidance of any reference to this pending litigation. The memorandum seeks to fabricate the appearance of the kind of agency interpretation to which this Court would provide deference under *Chevron v. Natural Resources Defense Council, Inc.*,, 467 U.S. 837 (1984).

At the end of the day, however, the agency's belated views on the issue in this case are entitled to the same level of deference that they would have absent such pre-filing machinations: none at all. The reasons for not giving deference to mere agency litigating positions do not disappear by removing the agency's

views from the text of the brief, placing them instead in a "memorandum" appended to the brief, and mailing that memorandum to regional agency offices a few days before the brief's filing. "Since such a [contrivance] can be formulated in practically every case," any other result would "amount[] to a test of whether the [Department of Justice] has a stupid staff. * * * [*Chevron*] requires courts to do more than insist upon artful * * * characterizations." *Cf. Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2898 n.12 (1992).

3. Both before and after the filing of the Solicitor General's brief, EPA has spoken to the legal issue raised in the case only once in a manner entitled to judicial deference under *Chevron*. In July 1985, EPA concluded that Section 3001(i) does not "exempt the regulation of incinerator ash from the burning of nonhazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28725-28726 (1985). That was the agency's authoritative view of the new statutory requirements, formulated contemporaneously to the law's passage, based on the statute's language, "legislative history and EPA's views of Congressional purposes for the new requirements." *Id.* at 28703.

By contrast, the EPA's subsequent abandonment of that position in the context of this litigation lacks any of the indicia justifying judicial deference. In no event, therefore, does it provide a sound basis for asking the court of appeals to reconsider its prior ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

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[6] Petitioners have advised us that they, too, plan on filing a supplemental brief that argues against the Solicitor General's suggestion that a remand is warranted.

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v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONERS

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SUPPLEMENTAL BRIEF OF THE PETITIONERS

This supplemental brief is submitted pursuant to Rule 15.7 of the Rules of this Court to respond to the Brief of the United States as Amicus Curiae, filed with the Court on October 19, 1992. The United States has suggested that this Court grant certiorari, vacate the judgment of the court of appeals, and remand this case to the Seventh Circuit for reconsideration in light of the memorandum issued by the Environmental Protection Agency ("EPA") on September 18, 1992. In that memorandum, EPA set forth its view that Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), exempts the ash produced by the

combustion of municipal solid waste at resource recovery facilities from hazardous waste regulation under Subtitle C of RCRA (see *id.* §§ 6921-6939). We of course agree with EPA's substantive determination, but we oppose the suggestion that this case be remanded to the Seventh Circuit for reconsideration in light of the recent EPA memorandum. That court has already explicitly rejected the two premises of the United States' argument: that the statute is ambiguous and that deference to EPA's view is appropriate. In our view, remand will not change the result but will occasion significant delay, expense, and uncertainty. Plenary review should be granted now.

1. Seizing upon a single phrase in Section 3001(i) that neither party to this case, nor the Seventh Circuit, nor the Second Circuit in *Environmental Defense Fund v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S.Ct. 453 (1991), considered to be relevant to the issue raised here, the United States asserts (Br. 7) that Section 3001(i) is ambiguous. The phrase the United States cites—a resource recovery facility "recovering energy from the mass burning of municipal solid waste"—does not in any way define the exemption granted by Section 3001(i). It merely describes the type of resource recovery facility that is covered by this section of RCRA. Only a resource recovery facility that is "recovering energy from the mass burning of municipal solid waste" is entitled to any exemption under Section 3001(i) from hazardous waste regulations. But the phrase says nothing about the scope of the exemption, which is the issue in this case. The phrase is therefore not only unambiguous, it is irrelevant to the issue dividing the parties and the courts of appeals. It is undisputed that the Northwest Facility is a resource recovery facility within the meaning of Section 3001(i). For this reason, even if the phrase the United States cites were ambiguous, its precise meaning would not be significant to resolving the issue raised in this case.

At any rate, the Seventh Circuit majority has already rejected the premise from which the United States begins. The majority held that the statutory language of Section 3001(i) is not ambiguous. It based its decision on what it believed was the meaning of the plain language of the statute. See Pet. App. 14a-16a. That language remains unchanged. On remand, the court is unlikely to change its opinion on the plain meaning of the statutory language in light of a recent memorandum from EPA.

2. The Seventh Circuit has also rejected the idea of deferring to EPA in this case. The majority reviewed the various statements EPA has issued regarding ash produced when municipal solid waste is burned at a resource recovery facility. Pet. App. 10a-12a. As the majority noted, the preamble to EPA's original household waste exclusion exempted ash from regulation as a hazardous waste. See 45 Fed. Reg. 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)). The EPA regulations issued after Section 3001(i) was adopted merely restated the language of Section 3001(i). See 40 C.F.R. § 262.4(b)(1). A preamble to the 1985 regulations, however, stated that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28,726 (July 15, 1985). In December 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. He stated that EPA had reexamined its 1985 interpretation of Section 3001(i), had concluded that it was in error, and that EPA believed that Congress had intended to exclude the ash from regulation under Subtitle C. Hearings on H.R. 2162, 16-17 (testimony of J. Winston Porter, Dec. 3, 1987). In May 1989, the Director of EPA's Office of Solid Waste testified before the same congressional hear-

ing, stating that EPA continued to follow its 1985 interpretation but believed that Section 3001(i) was ambiguous and needed clarification. *Id.* at 33 (testimony of Sylvia Lowrance, May 11, 1989).

After reviewing these various statements, the Seventh Circuit majority concluded that EPA's position was "waffling" and that "[t]he see-sawing statements from the EPA to which the district court gave 'little weight' deserve no weight at all." Pet. App. 33a. It is difficult to believe that yet another pronouncement from EPA would change the majority's view that EPA had spoken too many times already. Indeed, the latest memorandum may only confirm the majority's opinion that EPA's position is entitled to no weight because it continues to change.

The United States recognizes the proposition on which the Seventh Circuit majority relied. "'[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.'" Br. 16 n.9 (quoting *Pauley v. BethEnergy Mines*, 111 S. Ct. 2524, 2535 (1991)). But the United States attempts to overcome the majority's rejection of EPA's views on the basis that "EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented here." Br. 17. Of course, EPA's puzzlement about what the statute means is precisely why the Seventh Circuit has already refused to credit its opinion.

3. Remand will occasion substantial costs and delay. The parties will be put to the expense of litigating once again in the Seventh Circuit and after that, litigating another petition for a writ of certiorari. In addition, under the Seventh Circuit's judgment, the City of Chicago faces the possibility of substantial fines—up to $25,000 per day, *see* 42 U.S.C. § 6928(g)—which may continue to run while the resolution of the issue in this case is delayed. Other local governments have expressed their concern about potential lawsuits and fines against them.

See Brief Amici Curiae of City of Ames, Iowa, et al. in Support of Petitioner 8-9. More important, a remand will delay the resolution of the conflict between the circuits on this important issue of federal environmental law and will, therefore, prolong the uncertainty that currently undermines the ability of resource recovery facilities throughout the country to plan and carry out their operations. See Brief of the National League of Cities and National Association of Counties as Amici Curiae in support of Petitioners 6-9; Brief of the City of Spokane, Washington, et al. as Amici Curiae in Support of Petitioners 11-13.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for argument.

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